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HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 442

ELIZABETH GURLEY FLYNN, PETTIS PERRY, CLAUDIA JONES, ALEXANDER BITTELMAN, ALEXANDER TRACHTENBERG, VICTOR JEREMY JEROME, ALBERT FRANCIS LANNON, LOUIS WEINSTOCK, ARNOLD SAMUEL JOHNSON, BETTY GANNETT, JACOB MINDEL, WILLIAM WOLF WEINSTONE and GEORGE BLAKE CHARNEY,

Petitioners,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SECOND CIRCUIT

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15 American Law Review, 81 (Thayer) 26

Boudin, "Seditious Doctrines" and "Clear and Present Danger" Rule, 1952, 38 Va. Law Rev. 143, 343-344 ..... 49, 49fn

Department of State Publication 3573, August 1949, United States Relations with China 47

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No.

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Petitioners,

v.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Elizabeth Gurley Flynn, Pettis Perry, Claudia Jones, Alexander Bittelman, Alexander Trachtenberg, Victor Jeremy Jerome, Albert Francis Lannon, Louis Weinstock, Arnold Samuel Johnson, Betty Gannett, Jacob Mindel, William Wolf Weinstone and George Blake Charney respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit (A. App. 259-260)* affirming the judgments of conviction herein of the District Court for the Southern District of New York.

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*We thus refer to papers printed in the appendix record in the Court of Appeals. Minutes of the trial not printed in the appendix are hereinafter referred to as Tr. . Government exhibits are referred to as GE ; and petitioners' exhibits are referred to as DE .

Opinions Below

The opinion of the Court of Appeals (A. App. p. 186) is not yet reported. Judge DIMOCK's opinion overruling the challenge to the jury (A. App. 27) is reported at 106 F. Supp. 966.

Statement as to Jurisdiction

The judgment of the Court of Appeals was rendered on October 14, 1954, and it was entered in the office of the Clerk of said Court on the same day (A. App. 261). No petition for rehearing was filed in the Court of Appeals; hence there is no order respecting a rehearing. The jurisdiction of this Court is invoked under 28 U. S. C., section 1254(1).

Questions Presented for Review

1. Whether, because of the vagueness and indefiniteness of the standard of "clear and present danger" as defined in *Dennis* v. *United States*, 341 U. S. 494, 510, proof of the specific intent on the part of an accused to teach and advocate the overthrow of the Government of the United States by force and violence and to bring such overthrow about, is necessary to support a constitutional application to the accused of the Act and the standard.

2. Whether, if such proof is constitutionally required, the Smith Act and the standard of clear and present danger were constitutionally applied to these petitioners, in view of the fact that the trial judge, over the timely objection and exception of the petitioners, authorized the jury in his charge to predicate a finding of such intent on the basis of acts and declarations of alleged co-conspirators which were not shown to have been specifically authorized by the petitioners or actually known to and ratified by them.

3. Whether the petitioners, having made timely application therefor, were entitled to a trial or hearing of the issue of clear and present danger by either the trial judge or the jury.

4. Whether there was, at the date of the indictment herein, i.e., June 20, 1951, a clear and present danger, within the meaning given to that standard in the opinion of Chief Justice VINSON in the *Dennis* case, that an attempt at the forcible and violent overthrow of the Government of the United States would be made.

5. Whether as to each of the petitioners the evidence was sufficient to sustain the conviction.

6. Whether the trial judge prejudicially erred in the admission and reception of evidence.

7. Whether the trial court improperly denied petitioners' challenge to the jury system and supporting motions.

8. Whether petitioners were denied a trial by an impartial jury in that the climate of prejudicial opinion which pervaded the community made trial by an impartial jury impossible.

9. Whether the trial judge improperly denied petitioners' motion for mistrial on the ground of the misconduct of jurors.

Statutes Involved

The general conspiracy statute, 18 U. S. C. 371, provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

The Smith Act, as incorporated in the recent revision of the Federal Criminal Code, 18 U. S. C. 2385, provides:

> Whoever knowingly or willfully advocates, abets, advises, or teaches the duty, necessity, desirability, or propriety of overthrowing or destroying the government of the United States or the government of any State, Territory, District or Possession thereof, or the government of any political subdivision therein, by force or violence, or by the assassination of any officer of any such government; or,
>
> Whoever, with intent to cause the overthrow or destruction of any such government, prints, publishes, edits, issues, circulates, sells, distributes, or publicly displays any written or printed matter advocating, advising, or teaching the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence, or attempts to do so; or
>
> Whoever organizes or helps or attempts to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any such government by force or violence; or becomes or is a member of, or affiliates with, any such society, group, or assembly of persons, knowing the purposes thereof—
>
> Shall be fined not more than $10,000 or imprisoned not more than ten years, or both, and shall be ineligible for employment by the United States or any department or agency thereof, for the five years next following his conviction.

The Smith Act as it existed prior to the revision of the Federal Criminal Code, Act of June 28, 1940, c. 439, Title I, 54 Stat. 670-671, 18 U. S. C. (1940 ed.) secs. 10 and 11, provided:

Section 2. (a) it shall be unlawful for any person—

1. to knowingly or wilfully advocate, abet, advise, or teach the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence, or by the assassination of any officer of any such government;

2. with the intent to cause the overthrow or destruction of any government in the United States, to print, publish, edit, issue, circulate, sell, distribute, or publicly display any written or printed matter advocating, advising, or teaching the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence;

3. to organize or help to organize any society, group or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any government in the United States by force or violence; or to be or become a member of, or affiliate with, any such society, group, or assembly of persons, knowing the purposes thereof.

(b) For the purposes of this section, the term "government in the United States" means the Government of the United States, the government of any State, Territory, or possession of the United States, the government of the District of Columbia, or the government of any political subdivision of any of them.

Section 3. It shall be unlawful for any person to attempt to commit, or to conspire to commit any of the acts prohibited by the provisions of this title.

Section 4(f) of the Internal Security Act of 1950, 64 Stat. 992, 50 U. S. C. 783(f), provides in part:

Neither the holding of office nor membership in any Communist organization by any person shall consti-

tute per se a violation of subsection (a) or subsection (c) of this statute or of any other criminal statute.

28 U. S. C. A. Chapter 121—*Juries; Trial by Jury*:

Section 1861. *Qualifications*

Any citizen of the United States who has attained the age of 21 years and resides within the judicial district, is competent to serve as a grand or petit juror unless:

(1) He has been convicted of a crime * * *.

(2) He is unable to read, write, speak and understand the English language.

(3) He is incapable by reason of mental or physical infirmities to render efficient jury service.

(4) He is incompetent to serve as a grand or petit juror by the law of the State in which the district is held.

Section 1863. *Exclusion or Excuse from Service*

(a) A district judge for good cause may excuse or exclude from jury service any persons called as a juror.

(b) Any class or group of persons may, for the public interest, be excluded from the jury panel or excused from service as jurors by order of the district judge based on a finding that such jury service would entail undue hardship, extreme inconvenience or serious obstruction or delay in the fair and impartial administration of justice.

(c) No citizen shall be excluded from service as grand or petit juror on account of race or color.

New York Judiciary Law.

Section 502. *Qualifications of Trial Jurors*

In order to be qualified to serve as a trial juror, in a court of record, a person must be:

(1) A citizen of the United States, and a resident of the county.

(2) Not less than twenty-one nor more than seventy years of age.

(3) The owner, in his or her own right, of real property of the value of one hundred and fifty dollars, or of personal property of the value of two hundred and fifty dollars; or the husband of a woman or wife of a man who is the owner, in his or her own right, of real or personal property of that value.

(4) In the possession of his natural faculties, and not infirm or decrepit.

(5) Free from all legal exceptions; of fair character; of approved integrity; of sound judgment; and well informed.

Section 596. *Qualifications of Jurors*

In order to be qualified to serve as a juror in the counties included within a city having a population of one million or more, a person must:

Be intelligent, of sound mind and good character;
Well informed; able to read and write the English language understandably.

Constitutional Provisions Involved

AMENDMENT I

Congress shall make no law respecting an establishment of religion. or prohibiting the free exercise

thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

Statement of the Case

The indictment was returned on June 20, 1951, against the thirteen petitioners herein and eight other defendants (A. App. 4-11). Of the latter, four were not apprehended prior to commencement of the trial. The trial was severed as to two others because of illness. And two defendants were, on motion for acquittal, acquitted by the Court at the close of the Government's case (A. App. 1-3).

The indictment (A. App. 4-11) charges in a single count a conspiracy under Section 3 of the Alien Registration Act of 1940, commonly known as the Smith Act (54 Stat. 671; 18 U. S. C. (1946 ed.) §11; 18 U. S. C. (1948 ed.) §371) to engage in conduct prohibited by Section 2 of the Act (18 U. S. C. (1946 ed.) §10; 18 U. S. C. (1948 ed.) §2385), to wit: "(1) Unlawfully, wilfully, and knowingly, to advocate and teach the duty and necessity of overthrowing and destroying the Government of the United States by force and violence; and (2) unlawfully, wilfully, and knowingly, to organize and help to organize as the Communist Party of the United States of America a society, group and assembly of persons who teach and advocate the overthrow and destruction of the Government of the United States by force and violence" (A. App. 4-5).

The trial judge held that the statute of limitations had run against the charge of conspiracy to organize the Communist Party and therefore instructed the jury that they could not find any of the petitioners guilty thereof (A. App. 135-136).

The indictment charged the commission of twenty-nine overt acts, none of which in itself constituted an offense under the laws of the United States (A. App. 7-11). The Government did not contend that more than six of the overt acts had been charged (A. App. 139).

The petitioners moved prior to trial for continuance and during the trial for mistrials on the ground that they were being deprived of the right to an impartial jury by being forced to trial in an environment of violent hostility against them, much of which had been engendered by agencies of Government (Vol. VI, Doc. Nos. 179, 180, 202; Vol. VIII, Doc. No. 237; Vol. VIII, Doc. No. 277; Vol. IX, Doc. No. 283).* All of said motions were denied.

On February 27, 1952, prior to the trial of the indictment, petitioners filed written notice that they would

* Since the prejudicial climate alleged was nationwide, no purpose would have been served by a motion for change of venue; hence no such motion was made.

"challenge the array and move to quash and dismiss the entire panel, venire and jury list, on the ground that the methods of choosing the array, panel, venire and juries are such as to preclude the selection of a representative cross section of the community for service on the juries of this Court" (Vol. V, Doc. No. 150). More specifically, the documents thereafter filed by petitioners in support of said challenge alleged the following objections to the method of jury selection in the Southern District: (1) That Negroes, Puerto Ricans and manual workers were intentionally and systematically limited to mere token representation on the jury list; (2) that the responsible jury officials failed to employ methods which would ensure representation of a cross-section of the community in the composition of the jury list; and (3) that the basic jury list was so weighted with and loaded by numerically small but economically dominant groups in the community, as to preclude a fair and impartial trial of these petitioners, who advocated policies in conflict with the interests of said groups (Vol. VI, Doc. Nos. 181, 189, 191, 199). On April 15, 1952, in an oral order from the bench, the trial judge denied petitioners' challenge (Tr. 702) and thereafter, on July 25, 1952, filed his written opinion thereon (A. App. 27).

In the course of the trial the trial judge over the timely objection of the petitioners admitted testimony that was incompetent, irrelevant and immaterial and of so inflammatory a nature as to make a fair trial impossible (A. App. 73-81).

After the evidence was in but prior to the conclusion of the trial a letter came to the trial judge which stated "that the jurors have said that Marxists all want to overthrow the Government by force" (A. App. 117). On December 17, 1952, he conducted an interrogation of the jurors (A. App. 117-125). At the conclusion of the interrogation he excused one of the jurors, Mrs. Sybil Kane (A. App. 125-126), and although there were indications by an-

other of the jurors, Miss Miller, that other jurors had also said "that Marxists all want to overthrow the Government by force" (A. App. 122), the trial judge refused to grant petitioners' motion for a mistrial. On December 18, 1952, the morning after she had been excused as a juror, Mrs. Kane telephoned Mrs. Mary M. Kaufman, one of the attorneys for the petitioners, and said in substance that with the exception of one or two, "all of the jurors have discussed the issues involved in the case and have expressed opinions and judgments thereon", and that "at least four of the jurors have held and expressed a judgment on the case adverse to the defendants 'right along'" (Vol. VII, Doc. No. 268). On the strength of these statements of Mrs. Kane, which were embodied in an affidavit by Mrs. Kaufman (Vol. VII, Doc. No. 268), petitioners moved for a further investigation of the conduct of the jurors (Tr. 14061), but the trial judge denied their application (Tr. 14087). Petitioners thereupon subpoenaed Mrs. Kane to appear on December 19, 1952, and, in support of an application which they then made to the trial judge for a reconsideration of his denial of a further investigation into the conduct of the jurors, offered to call Mrs. Kane as a witness to testify in respect to the matters set forth in Mrs. Kaufman's affidavit (A. App. 127), but the trial judge denied this application (A. App. 128); whereupon petitioners moved for a mistrial, which the judge denied (A. App. 128).

At the close of the Government's case (Tr. 9751), as well as at the close of the entire case (Tr. 13760), petitioners moved for the direction of an acquittal on the ground that the evidence was legally and constitutionally insufficient to establish their guilt beyond a reasonable doubt. The insufficiency of the evidence is discussed *infra*.

Prior to the submission of the case to the jury petitioners filed a written motion with the trial judge in which they requested that the issue of "clear and present dan-

ger" be submitted to the jury, and in the alternative, that "if the Court reserves this issue for its own determination and bars the jury from considering it, we request the Court to hold a hearing on this issue and to permit the presentation of evidence and argument" (Vol. VIII, Doc. No. 275; Tr. 13412-13420). The trial judge denied this motion in all respects, saying among other things: "I consider that I have sufficient before me in the record and in the material of which I am entitled to take judicial notice to make the determination of clear and present danger" (Tr. 13671). In the argument made *infra,* petitioners contend that there was in fact no clear and present danger, as that term was defined in *Dennis* v. *United States,* 341 U. S. 494, 510, which would support a constitutional application of the Smith Act to these petitioners.

The trial judge also refused to instruct the jury, as the petitioners requested him to do, that "the acts or statements of some other member of the conspiracy not made with the actual knowledge or the prior request or authorization of a defendant may not be considered in determination of that defendant's personal intent" (Vol. IX, Doc. No. 284, p. 9). Over petitioners' timely objection, he authorized the jury to predicate a finding of petitioners' intent on the basis of third party acts and declarations which were not shown to have been authorized or adopted or ratified by petitioners (Vol. IX, Doc. No. 284, p. 10). Petitioners argue *infra* that the instructions as given to the jury resulted in an unconstitutional application of the Smith Act to these petitioners.

Reasons for Allowing the Writ

There are presented here for decision a number of important questions which have not been but should be settled by this Court. Several of the questions decided by the Court below have been decided in a way probably in conflict with applicable decisions of this Court. Some of the

questions are important in the administration of the Smith Act and are present in the cases named in the footnote in which appeals from convictions under the Smith Act are now pending.* The same questions are certain to arise in pending but untried cases as well as in future prosecutions under the Smith Act.

I

Proof of the specific intent of each petitioner to teach and advocate the overthrow of the Government by force and violence and to bring that result about as speedily as circumstances would permit, was necessary to a constitutional application of the Smith Act here. That intent, being constitutional in nature, was provable only by the acts and declarations of the accused himself or by those of third persons which he had actually authorized or knowingly ratified. By instructing the jury, over the timely objection of the petitioners, that they could find such intent on the basis of third party acts and declarations *not* so authorized or ratified by petitioners, the trial judge committed reversible error.

The petitioners contend that the trial judge's instructions to the jury resulted in an unconstitutional application of the Smith Act to them. They maintain that proof of their specific intent to teach and advocate the forcible and violent overthrow of the Government of the United States and to bring such overthrow about, was required not only by the statute, but by the First and Fifth Amendments; and that that intent could be proved only by their own acts and declarations or by those of third persons which they had actually authorized or knowingly adopted or ratified.

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* *United States* v. *Yates, et al.*, 9th Cir., No. 13480; *United States* v. *Wellman, et al.*, 6th Cir., No. 12237; *United States* v. *Huff, et al.*, 9th Cir.; *United States* v. *Fujimoto, et al.*, 9th Cir.; *United States* v. *Mesarosh, et al.*, 3rd Cir.; *United States* v. *Forest, et al.*, 8th Cir.; *United States* v. *Kuzma, et al.*, 3rd Cir.

The trial judge refused to instruct the jury, as the petitioners requested him to do, that "the acts or statements of some other member of the conspiracy not made with the actual knowledge or the prior request or authorization of a defendant may not be considered in determination of that defendant's personal intent" (Vol. IX, Doc. No. 284, p. 9). Instead, over petitioners' timely objection, he authorized the jury to predicate a finding of petitioners' intent on the basis of third party acts and declarations which were not shown to have been authorized, or adopted or ratified by petitioners. In so doing he authorized the jury to base their finding of the intent necessary to a constitutional application of the statute on evidence not rationally probative thereof. Hence, the verdict does not constitute the finding necessary to support the application of the Smith Act to these petitioners.

Petitioners' argument in support of the foregoing may be summarized as follows:

The opinion of Chief Justice VINSON in *Dennis* v. *United States*, 341 U. S. 494, 514-515, held that the Smith Act "may be applied where there is a 'clear and present danger' of the substantive evil which the legislature had the right to prevent." The opinion recognized, however, that "clear and present danger" as therein defined, i.e., "whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger" (341 U. S. at 510), is not sufficiently definite to give fair notice of the circumstances in which speech is proscribed; and, hence, that it is not sufficiently definite to permit of the punishment of speech, consistently with the requirements of the First and Fifth Amendments, unless the accused is shown to have had the specific intent to teach and advocate the overthrow of the Government by force and violence and to bring such overthrow about as speedily as circumstances would permit (341 U. S. at 515-516). The petitioners say that the specific intent thus required is one

that has a constitutional function to perform, i.e., to take the place of the notice or warning which a standard of guilt—particularly one that is restrictive of First Amendment freedoms—must give an accused in order to support the application to him of a statute aimed at the restriction of speech. They further say that the required intent can perform that function only if it is shown to have been *personally and actually* entertained by the accused. Such a showing, they maintain, can be made only by evidence of his own acts and declarations or those of third persons which he has actually authorized or knowingly adopted or ratified.* The trial judge's instructions, as we have said, authorized the jury to base their finding of intent on the basis of third party acts and declarations *not* authorized or ratified by petitioners. Hence, the verdict cannot be said to constitute a valid finding of the intent necessary to a constitutional application of the Smith Act to these petitioners.

The Court of Appeals held that proof of an accused's intent to teach and advocate violent overthrow of the Government and to bring such overthrow about is not necessary to a constitutional application of the Smith Act (A. App. 190-191). Hence it sustained the trial judge's instructions as given to the jury and his refusal to give the instruction requested by petitioners (A. App. 191-196). The Court below was in error. For the opinion of the Chief Justice in *Dennis* makes it clear that the intent which has to be shown to support the application of the Smith Act to an accused, is a matter not only of statutory, but of constitutional requirement (341 U. S. at 515-516). And such an intent, as we have said, may be shown only by evidence of the accused's own acts and declarations or those of third

* We show *infra* at pp. 22 to 30 why this must be so in a case such as this, where the standard of guilt, because of its vagueness, may be constitutionally applied only if the accused is shown to have had such an evil state of mind as to relieve the standard of "the objection that it punishes without warning an offense of which the accused was unaware." Cf. *Screws* v. *United States*, 325 U. S. 91, 101-102.

persons which he has actually authorized or knowingly adopted or ratified. For were it otherwise, it would open the door to a dragnet application of the Act. Our meaning is this:

The charge in this case of conspiracy to teach and advocate the proscribed doctrine is predicated on the premise that petitioners are adherents of the principles of Marxism-Leninism; that these principles teach and advocate the duty and necessity of overthrowing and destroying the Government of the United States by force and violence; and that petitioners, by their adherence to Marxism-Leninism, have made such teaching and advocacy their own. The petitioners dispute this prosecution version of Marxism-Leninism. They maintain that it contains no such teaching or advocacy. Indeed, they say that as Marxism-Leninism has evolved and developed since 1935, and more particularly since the end of World War II, it teaches and advocates, and the Communist movement both here and abroad teaches and advocates, that in countries which provide channels for the peaceful expression and effectuation of the popular will, the working class and its allies can and should seek to win governmental power by peaceful means. They point to the fact that even the *pre-1935* teaching and advocacy of Marxism-Leninism and of the Communist Party of the United States were regarded by this Court as reasonably susceptible of the interpretation that they "desired to achieve (their) purpose by peaceful and democratic means." Witness the following from *Schneiderman* v. *United States,* 320 U. S. 118, 157:

> "A tenable conclusion from the foregoing (i.e., Marxist-Leninist writings) is that the Party in 1927 desired to achieve its purpose by peaceful and democratic means, and as a theoretical matter justified the use of force and violence only as a method of preventing an attempted forcible counter-overthrow once the Party had obtained control in a peaceful manner, or as

> a method of last resort to enforce the majority will if at some indefinite future time because of peculiar circumstances constitutional or peaceful channels were no longer open."

Certainly, in view of the developments in Marxist-Leninist theory since 1935, less cannot be said today. At worst, then, Marxism-Leninism may be said to be susceptible of two interpretations, one reprehensible and the other not. Hence, unless inquiry into the intent of an adherent of Marxism-Leninism is limited to an inquiry into his own acts and declarations and those of third persons which he has actually authorized, or knowingly adopted or ratified, a reprehensible intent may be imputed to him, notwithstanding that his own understanding of Marxism-Leninism and his intent in the teaching and advocacy thereof contemplate the achievement of its purposes only by peaceful and democratic means.

In *Dennis* a majority of the Court held that the First Amendment protects *all* speech up to the point that it creates a clear and present danger of substantive evil. Hence it was held that the Smith Act could be constitutionally applied to the utterances there involved only if they created a clear and present danger of the evil apprehended therefrom, i.e., an attempt at the overthrow of the Government of the United States by force and violence (341 U. S. at 514). Until *Dennis* was decided, the standard by which the existence of clear and present danger was measured was that first stated by Mr. Justice HOLMES in *Schenck* v. *United States*, 249 U. S. 49, 52:

> "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."

The opinion of Chief Justice VINSON in *Dennis*, which is hereinafter referred to as the plurality opinion, substituted for the *Schenck* standard the following (341 U. S. at 510):

> "In each case [courts] must ask whether the gravity of the 'evil', discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."

The Chief Justice frankly acknowledged that the foregoing is a standard that is "indeterminate" and "subject to criticism on the score of indefiniteness" (341 U. S. at 515-516). If he nevertheless held that, as applied to the *Dennis* defendants, it did not contravene the First and Fifth Amendments by reason of its vagueness, it was because he thought that they fell within a category which he described as follows (341 U. S. at 516):

> "We think it (i.e., the standard of clear and present danger as defined in *Dennis*) will serve to indicate to those who would advocate constitutionally prohibited conduct that there is a line beyond which they may not go—a line which they, in full knowledge of what they intend and the circumstances in which their activity takes place will well appreciate and understand."

The opinion made it clear, however, that the standard could be applied to an accused, consistently with the requirements of the First and Fifth Amendments, only if, among other things, he was shown to have had the specific intent to bring about the substantive evil that Congress sought to prevent. For it declared (341 U. S. at 516):

> "*Where there is doubt as to the intent of the defendants,* the nature of their activities, or their power to bring about the evil, *this Court will review the convictions with the scrupulous care demanded by our Constitution.*" (Emphasis added.)

That a standard of "gravity of the 'evil', discounted by its improbability" is too vague to provide the boundary of permissible speech under the First Amendment or to give "fair notice of what to avoid" under the Fifth Amendment (Mr. Justice FRANKFURTER, dissenting, in *Winters* v. *New York*, 333 U. S. 507, 524), except, possibly, to those who *actually* entertain the intent to bring about the substantive evil that Congress sought to prevent, would seem almost too clear for argument. Justices FRANKFURTER and JACKSON bespoke the difficulties that inhere in the standard, even as it was applied in *Dennis*. Thus Mr. Justice FRANKFURTER said (341 U. S. at 551):

> "To make validity of legislation depend on judicial reading of events still in the womb of time—a forecast, that is, of the outcome of forces at best appreciated only with the knowledge of the topmost secrets of nations—is to charge the judiciary with duties beyond its equipment. We do not expect courts to pronounce historic verdicts on by-gone events. Even historians have conflicting views to this day on the origin and conduct of the French Revolution. It is as absurd to be confident that we can measure the present clash of forces and their outcome as to ask us to read history still enveloped in clouds of controversy."

And Mr. Justice JACKSON wrote (341 U. S. at 570):

> "If we must decide that this Act and its application are constitutional only if we are convinced that petitioners' conduct creates a 'clear and present danger' of violent overthrow, we must appraise imponderables, including international and national phenomena which baffle the best informed foreign offices and our own most experienced politicians. We would have to foresee and predict the effectiveness of Communist propaganda, opportunities for infiltration, whether and when a time will come that they consider propitious

for action, and whether and how fast our existing government will deteriorate. And we would have to speculate as to whether an approaching Communist coup would not be anticipated by a nationalistic fascist movement. No doctrine can be sound whose application requires us to make a prophecy of that sort in the guise of a legal decision. The judicial process simply is not adequate to a trial of such far-flung issues. The answers given would reflect our own political predilections and nothing more."

If these are the difficulties with which the plurality's clear and present danger standard confronts judges, what shall we say of the problems it poses to the citizen? It obviously provides him with no guides to the determination of what the scope of his freedom to speak is. Nor does it give him "fair notice of what to avoid," which is "included in the conception of 'due process of law'" (Mr. Justice FRANKFURTER, dissenting, in *Winters* v. *New York*, 333 U. S. 507, 524). For it says nothing as to what degree of probability of occurrence of the substantive evil will justify invasion of his freedom to speak, nor does it tell him how the necessary (albeit unspecified) degree of probability is to be ascertained, or how it will be determined.* Indeed, the plurality opinion says that he is not to be supplied with this knowledge even when called upon to defend himself against the charge that he has transgressed the boundary of permissible speech. For it says that these

* That *degree* of probability must determine the justifiability of the invasions of free speech, is made clear by the creator of the plurality's clear and present danger standard, Judge LEARNED HAND, who said at one point in his opinion for the Court of Appeals for the Second Circuit, in *United States* v. *Dennis*, 2 Cir., 183 F. 2d 201, 213: "We need not say that even so thoroughly planned and so extensive a confederation would be a 'present danger' at all times and in all circumstances; the question is how imminent: That is, *how* probable of execution—it was in the summer of 1948, when the indictment was found." At page 215 of his opinion Judge HAND wrote: "As we have said, 'clear and present danger' depends upon whether the mischief of the repression is greater than the gravity of the evil, discounted by its improbability; *and it is of course true that the degree of probability that the utterance will bring about the evil is a question of fact.*" (Emphasis added.)

questions are to be decided not by the jury, but by the trial judge, *as a matter of law and without hearing any evidence thereon* (341 U. S. at 511-514).

Unless the plurality standard is limited to those who possess the actual intent to bring about the substantive evil it must inevitably operate as a deterrent to the exercise of constitutionally protected activities.* After all, clear and present danger as the plurality opinion defined it is not a standard aimed only at Communists or at the teaching and advocacy of the forcible and violent overthrow of Government. It is a *general* standard. It applies to *all* men. And if men, regardless of their actual, personal intent, must guess at their peril whether their speech will be regarded as creating a degree of probability of substantive evil sufficient to justify invasion of their freedom to speak, they will not speak. Indeed, it is more than doubtful that men will not be deterred from speaking even when an evil intent is required (Cf. Mr. Justice FRANKFURTER, concurring, in *Dennis*, 341 U. S. at 549).**

It would therefore seem clear that the Court of Appeals was in error when it held that proof of an accused's evil intent is not essential to a constitutional application of the statute to him (A. App. 190).

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* What we say as to the deterrent effect of the standard, would be true even if it were limited in its application to the teaching and advocacy of forcible and violent overthrow of government. For men can never be sure that their peaceful utterances may not be regarded as violent ones. Witness the fact that in the *Dennis* case the Communist Party was held to teach and advocate forcible and violent overthrow of the Government on the basis of writings of which this Court had previously said in *Schneiderman* v. *United States*, 320 U. S. 118, 157: "A tenable conclusion from the foregoing is that the Party in 1927 desired to achieve its purpose by peaceful and democratic means, and as a theoretical matter justified the use of force and violence only as a method of preventing an attempted forcible counter-overthrow once the Party has obtained control in a peaceful manner, or as a method of last resort to enforce the majority will if at some indefinite future time because of peculiar circumstances constitutional or peaceful channels were no longer open."

** In the *New York Times*, Magazine Section, February 15, 1953, Mr. Arthur Hays Sulzberger, publisher of that newspaper, wrote: "There has been dropped upon utterance and ideas a smokescreen of intimidation that dims essential talk and essential thought." Does this not suggest that the Court ought to revisit *Dennis* (*West Va. State Bd. of Ed.* v. *Barnette*, 319 U. S. 624, 630; *Helvering* v. *Griffiths*, 318 U. S. 371, 401, note 52)?

Which brings us to the central question under this point, namely: If the plurality standard of clear and present danger may be applied to an accused only when he is shown to have had a specific evil intent, how must such intent be proved?

The question arises because the trial judge refused to instruct the jury, as the petitioners requested him to do, that "the acts or statements of some other member of the conspiracy not made with the actual knowledg or the prior request or authorization of a defendant may not be considered in determination of that defendant's personal intent" (Vol. IX, Doc. No. 284, p. 9), and because his instructions, as given, to which petitioners made timely objection, permitted "the declarations and statements of non-defendants or of co-defendants not authorized or ratified by the particular defendant, to be considered as evidence of that defendant's intent" (Vol. IX, Doc. No. 284, p. 10).*

In order that it may be made clear why the instruction requested by the petitioners was constitutionally necessary

* The portion of the instructions to which petitioners made the above objection reads as follows (A. App. 142):

> "As I have told you, you must be satisfied beyond a reasonable doubt that the defendants wilfully conspired, during the period beginning not earlier than May 1945 and ending on June 20, 1951, to accomplish the objective charged in the indictment which I have previously mentioned. The evidence which has been received relating to the period prior to the alleged conspiracy should be considered by you only in determining the intent of the defendants concerned. You may not consider such evidence in determining the intent of any other defendant to commit the offense charged unless you find that the statement or act concerned was made or done by the direction or authority or with the approval of such other defendant. *All of the rest of the evidence in the case, however, you may consider against all of the defendants* except as I have just instructed you, in determining the question of the initial participation of a particular defendant in the alleged conspiracy you cannot consider statements and declarations alleged to have been made by persons other than that defendant." (Emphasis added.)

The objection which petitioners made to the foregoing reads as follows (Vol. IX, Doc. 284, p. 10):

> "That portion of this instruction beginning, 'All the rest of the evidence' permits the jury to consider all evidence in the period May 1945 and thereafter against all defendants and on the question of intent. It thus permits the declarations and statements of non-defendants or of co-defendants not authorized or ratified by the particular defendant, to be considered as evidence of that defendant's intent."

and why the instruction as given resulted in an unconstitutional application of the statute to them, it is necessary to say the following:

In *Screws* v. *United States,* 325 U. S. 91, 101, the Court said:

> "The constitutional vice in such a statute (i.e., a vague and indefinite criminal statute) is the essential injustice to the accused of placing him on trial for an offense, the nature of which the statute does not define and hence of which it gives no warning. * * * But where the punishment imposed is only for an act knowingly done with the purpose of doing that which the statute prohibits, the accused cannot be said to suffer from lack of warning or knowledge that the act which he does is a violation of law. The requirement that the act must be willful or purposeful may not render certain, for all purposes, a statutory definition of the crime which is in some respects uncertain. But it does relieve the statute of the objection that it punishes without warning an offense of which the accused was unaware."

Since, as the Court said in *Screws, supra,* the requirement of a specific evil purpose or intent may "relieve [a vague and indefinite] statute of the [constitutional] objection that it punishes without warning an offense of which the accused was unaware," it is clear that the function of such an intent is a *constitutional* one. For when such a purpose or intent is proved, it will be deemed to supply or compensate for the constitutional ingredient of notice and warning which the standard of guilt lacks.*

Now, it would seem to be equally clear that if a vague and indefinite standard of guilt may be cured by the accused's evil state of mind, the state of mind that must be proved is one that *he himself* has *actually* possessed, and

* Cf. plurality opinion in *Dennis,* 341 U. S. at 515-516.

one that is deduced or inferred from facts which are rationally *probative* of an individual's mental state. For the function which the accused's state of mind must perform is to fill the gap in the standard of guilt. That is to say, his *actual* state of mind must be such that he needs no *warning* from the standard. To permit anything else to sustain a conviction under a vague standard of guilt, is to make a mockery of the principle that only an evil state of mind may compensate constitutionally for the lack of warning in the standard. *For then the accused may be convicted although he has had neither warning from the standard nor a state of mind that makes warning to him constitutionally unnecessary.*

What is required in this respect was clearly expressed by the Court in *American Communications Asso.* v. *Douds*, 339 U. S. 382, 413, in these words:

> "And since the constitutional vice in a vague or indefinite statute is the injustice to the accused in placing him on trial for an offense, the nature of which he is given no fair warning, *the fact that punishment is restricted to acts done with knowledge that they contravene the statute makes this objection untenable.* As this Court pointed out in United States v. Ragen, 314 U. S. 513, 524 (1942), *'A mind intent upon willful evasion is inconsistent with surprised innocence.'* " (Emphasis added.)

To speak, in this context, of an accused's "knowledge" and of "a mind intent upon willful evasion", is to speak of a state of mind *actually* possessed by the accused. For as Mr. Justice HOLMES said in his *The Common Law*, 56, *"The question of knowledge is a question of the actual condition of the defendant's consciousness."* How is the actual condition of a man's consciousness proved? In the *Douds* case, *supra*, 339 U. S. at 411, Chief Justice VINSON, writing for the Court, said that "the state of a man's

mind must be inferred from the things he says or does." It cannot be inferred from the acts or declarations of anyone else, unless he has actually authorized or ratified such acts and declarations. For nothing that one man says or does can ever be evidence of another man's state of mind, unless the latter has actually authorized it or, with knowledge thereof, has adopted or ratified it. And this is true regardless of what the relationship between the two men is. For if an *actual* evil state of mind on the part of an accused is necessary in order to give constitutional validity to the application to him of a vague and indefinite criminal standard, the acts and declarations of co-conspirators, even when made in the course of the conspiracy and in furtherance of its objects, are no more evidentiary of the accused's state of mind than are those of any other third person, unless the accused has actually authorized or ratified them.

An examination into the theory on which, in the ordinary conspiracy case, one conspirator's acts and declarations may be considered by the jury in determining the guilt of another, will demonstrate that not even in such a case are the co-conspirator's acts and declarations regarded by the law as *evidentiary* of the accused's state of mind. To begin with, conspirators are regarded in the law as agents of one another in the prosecution of the common enterprise (*Hitchman Coal & Coke Co.* v. *Mitchell*, 245 U. S. 229, 249). Hence, "the act or declaration of one, in furtherance of the common object, is the act of all, and is admissible as primary and original evidence against them", under the general rule that the act of the agent in the course of his employment and within the scope of his authority is the act of his principal (*Hitchman Coal & Coke Co.* v. *Mitchell*, *supra*, at 249). This rule, as Mr. Justice HOLMES said in his *Collected Legal Papers*, 49, rests upon the "fiction • • • that, within the scope of the agency, principal and agent are one." And the fiction obtains in the criminal, as well as in the civil, law. Witness the Court's use of it in its

most recent exposition, in *Lutwak* v. *United States*, 344 U. S. 604, 617, of the theory on which the declarations of one conspirator may be used against another:

> "Declarations of one conspirator may be used against the other conspirator not present on the theory that the declarant is the agent of the other and *the admissions of one are admissible against both under a standard exception to the hearsay rule applicable to the statements of a party.*" (Emphasis added.)

The acts, declarations and knowledge of one conspirator, done, made and acquired in furtherance of the objects of the conspiracy, are considered against his co-conspirators on the same theory that the acts, declarations and knowledge of an attorney are ordinarily considered against his client (*In re Locust Building Co., supra*, C. C. A. 2, 299 Fed. 756, 769, cert. den., sub. nom., *Keighly* v. *American Trust Co.*, 265 U. S. 590), i.e., "that within the scope of the agency, principal and agent are one" (HOLMES, *supra, Collected Legal Papers*, 49). This theory does not, however, rest on or contain within itself any notion that the acts or declarations of an agent are *evidence of the principal's state of mind* (Mechem, *The Law of Agency*, 2d ed., §1803, p. 1384).

Acts and declarations of an agent or conspirator are considered against the principal or co-conspirator *not* because they are *evidentiary* of the state of mind of the principal or co-conspirator, but because the latter is, under substantive law, *chargeable* with them. Thus, Professor Thayer said in 15 *American Law Review*, 81, "the rule which says that a man should be charged with the acts and declarations of his agent or fellow co-conspirator is not a rule of evidence." And Judge LEARNED HAND said the same when, in *Van Riper* v. *United States*, C. C. A. 2, 13 F. 2d 961, 967, cert. den., sub. nom., *Ackerson* v. *United States*, 273 U. S. 702, he wrote on behalf of the Court:

> "Such declarations (of co-conspirators) are admitted upon no doctrine of the law of evidence, but of the substantive law of crime. When men enter into an agreement for an unlawful end, they become ad hoc agents for one another, and have made 'a partnership in crime'. What one does pursuant to their common purpose all do, and as declarations may be such acts, they are competent against all."

Wherever we look, whether to text writers or to court decisions, we find that, underlying the imputation of an agent's or conspirator's acts and declarations to his principal or co-conspirators, is the "fiction that, within the scope of the agency, principal and agent are one" (HOLMES, *supra, Collected Legal Papers,* 49). The acts and declarations of the agent or conspirator are treated *as if* they were done and made by the principal or co-conspirator (Wigmore, 4 *Evidence,* §1078, p. 119).

Thus in *United States* v. *Gooding,* 12 Wheat (U. S.) 460, Mr. Justice STORY, writing for an unanimous Court, said at p. 469: " * * * [T]he act of one conspirator, in the prosecution of the enterprise, is *considered* the act of all, and is evidence against all. Each is *deemed* to consent to, or command, what is done by any other in furtherance of the common object." (Emphasis added.) So, too, in *Sundry Goods* v. *United States,* 2 Pet. (U. S.) 358, a case in which the Government filed a libel praying that certain goods seized be deemed forfeited and disposed of according to law, where the owner of the goods complained that transactions and declarations of his agent had been erroneously received in evidence against him, the Court relying upon the decision in *Gooding, supra,* said, at 364, that, "whatever an agent does, or says, in reference to the business in which he is at the time employed, and within the scope of his authority, is done or said by the principal; and may be proved, as well in a criminal as a civil case; in like manner *as if* the evidence applied personally to the principal." (Emphasis added.)

That a conspirator's acts and declarations are *not* received and considered against his co-conspirators on the

theory that they constitute evidence of the mental state of the co-conspirators, is conclusively established by the fact that such acts and declarations are receivable against and chargeable to the co-conspirators *even though they may have been done and made long before the latter joined the conspiracy and never became known to the co-conspirators.** Thus did Judge LEARNED HAND, writing for the Court, say in *Van Riper* v. *United States, supra,* 2 Cir., 13 F. 2d 961, 967, cert. den., sub. nom., *Ackerson* v. *United States,* 273 U. S. 702: "[I]t is also a part of the law of joint crimes that when a party joins an existing group already so engaged, he *assumes responsibility* for all that has been done theretofore. * * * *For this reason* all that was done before he entered may be used against him * * *." (Emphasis added.)

The Court below refused to recognize that proof of evil intent was constitutionally required in this case. But it held that even if it was, acts and declarations of co-conspirators might be considered by the jury, even though they had not been actually authorized or knowingly ratified by petitioners. In this, as we have shown, it erred. The rule which permits of the use of third party declarations even in a run-of-the-mine conspiracy case has been trenchantly criticized.** This Court has acknowledged the cogency of

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* The statement in cases such as *Pinkerton* v. *United States,* 328 U. S. 640, 647 and *Wiborg* v. *United States,* 163 U. S. 632, 657, 658, that "motive or intent may be proved by the acts or declarations of some of the conspirators in furtherance of the common objective" do not contradict the thesis of the cases cited above. The context in which the statement appears in each of these cases shows that all that the Court intended to say was that since the act or declaration of one conspirator is treated in the law *as if* it had been done or made by all, an act or declaration by one conspirator indicative of the motive or intent of the conspiracy is *deemed* to have been made by all and is, therefore, usable against all.

** In *Pinkerton* v. *United States, supra,* 328 U. S. 640, 650, Mr. Justice RUTLEDGE dissenting, said: "The looseness with which the charge (of conspiracy) may be proved, the almost unlimited scope of vicarious responsibility for others' acts which follows once agreement is shown, the psychological advantage of such trials for securing convictions by attributing to one proof against another, these and other inducements require that the broad limits of discretion allowed to prosecuting officers in relation to such charges and trials be not expanded into new, wider and more dubious areas of choice."

that criticism. For in *Krulewitch* v. *United States,* 336 U. S. 440, 443, it said: "There are many logical and practical reasons that could be advanced against a special evidentiary rule that permits out-of-court statements of one conspirator to be used against another." And while it felt constrained to add that "however cogent these reasons, it is firmly established that where made in furtherance of the objectives of a going conspiracy, such statements are admissible as exceptions to the hearsay rule," it clearly expressed its determination not "to expand this narrow exception to the hearsay rule" to new areas (336 U. S. at 443-444). To sanction its use in the determination of the intent which had to be shown in this case, demands an expansion thereof to the point where it collides with the Constitution. Intent here had to be proved not only as a matter of statutory requirement, but to give constitutional vitality to a vague and indefinite standard of guilt. As we have shown, only an intent *personally and actually possessed* by the accused can perform that function. To regard the acts and declarations of a co-conspirator, which have not been actually authorized or ratified by the accused, as an agreeable substitute, is to do violence to the requirements of due process of law. For, as we have said, this would permit of the conviction of an accused notwithstanding that he has had neither warning from the standard of "what to avoid", nor a state of mind that would make warning to him constitutionally unnecessary. Certainly, it is not too much to say that the "special evidentiary rule that permits out-of-court statements of one conspirator to be used against another"—"this narrow exception to the hearsay rule"—must find its limits in the constitutional requirement of due process of law.

The Court below laid stress on the fact that the trial judge repeatedly impressed upon the jurors the fact that guilt was personal, and that they had to find that the

individual intent of each petitioner was to overthrow the Government by force and violence. This is not responsive to the petitioners' complaint. What they complain of is that the trial judge authorized the jury to predicate their finding of the requisite specific intent on evidence that was not rationally probative thereof, i.e., on acts and declarations of alleged co-conspirators which were not shown to have been actually authorized by each petitioner or actually known to and ratified by him. It cannot, therefore, matter how often the trial judge instructed the jury that they had to find that the individual intent of each petitioner was to overthrow the Government by force and violence, for an erroneous authorization to the jury to predicate their finding of an accused's intent on the acts and declarations of *others* will vitiate their verdict (*Kotteakos* v. *United States,* 328 U. S. 750, 770-771).

The bulk of the evidence which the trial judge authorized the jury to consider in determining the specific intent of each petitioner, consisted of innumerable declarations of third parties which were not shown to have been actually authorized or actually known to and ratified by the petitioner. The number of such declarations runs literally into the dozens. Hence, if the trial judge erred in authorizing the jury to consider such evidence against the various petitioners, it is clear that his error cannot be dismissed as harmless. The erroneous admission of a *single* declaration in a case where the "record fairly shrieks the guilt of the parties" may sometimes be thought harmless (*Lutwak* v. *United States,* 344 U. S. at 619), although there are instances where the erroneous admission of even one declaration will constitute reversible error (*Krulewitch* v. *United States,* 336 U. S. 440, 444-445). Where, however, the number of alleged conspirators is as great as it was here (*Kotteakos* v. *United States,* 328 U. S. 750, 766), and the number of declarations which the court improperly per-

mitted the jury to consider on the question of specific intent are as multitudinous as they were here,* it would seem clear that the error affects substantial rights, and that the judgment of conviction must, therefore, be reversed (*Kotteakos* v. *United States, supra,* 328 U. S. 750, 770).

By authorizing the jury to consider third party acts and declarations as evidence of each petitioner's intent to cause the overthrow of the Government by force and violence—without requiring that they first find that such acts and declarations had been actually authorized or actually known to and ratified by such petitioner—the trial judge's charge committed what, under our system of law, is a cardinal error. "Guilt with us remains individual and personal, even as respects conspiracies" (*Kotteakos* v. *United States, supra,* 328 U. S. 750, 772). "[E]xtraordinary precaution is required not only that instructions shall not mislead, but that they shall scrupulously safeguard each defendant individually, as far as possible, from loss of identity in the mass. Indeed, the instructions often become, in such cases, his principal protection against unwarranted imputation of guilt from others' conduct" (*Kotteakos* v. *United States, supra,* 776-777). Here the necessity for proof of *personal guilt* was underscored by the requirement that each petitioner be shown to have *actually* entertained the specific intent to teach and advocate violent overthrow of the Government and to bring such overthrow about, in order to make application of the Smith Act to him constitutional. It is true the trial judge told the jury that a finding by them of such specific intent on the part of each

* Third party declarations which the trial judge so authorized the jury to consider included those which appear in the appendix record (Appendix to Appellants' Brief in the Court of Appeals) at pp. 61-70; 73-81; 83; 84-85; 85-86; 87-88; 89; 91; 92; 94-95; 96; 97; and those which appear in the typewritten transcript at the following pages: Tr. 2056-2057; 3858; 4274; 4350; 4443-4446; 4450-4455; 4456-4458; 4459-4461; 4462-4463; 4465-4467; 4468-4471; 4473-4474; 6582-6583; 6602-6604; 6628-6629; 7200; 7230; 7234-7235; 7271; 7612-7613; 8232-8233; 8330-8331; 8349; 8392-8393; 8410; 8432-8434; 8434-8436; 8439.

petitioner was necessary to a finding of his guilt. But he nullified this when he also charged them that they could consider the acts and declarations of others as evidence of each petitioner's specific intent, regardless of whether the petitioner was shown to have actually authorized or to have actually known of and ratified such acts and declarations. For in this wise, the trial judge authorized the jury to predicate each petitioner's guilt not on his own intent, but on the intent of others, which is guilt by association in its most virulent form.

II

Neither the evidence adduced at the trial nor the facts judicially noticed by the trial judge showed the existence of the clear and present danger, as defined in *Dennis*, which is necessary to the constitutional application of the Smith Act.

In the case at bar, the clear and present danger rule has been so far diluted, that virtually nothing remains of it, save its name. For in response to the contention of the petitioners that there was no probability, at the time of their indictment, that their teaching and advocacy would result in the substantive evil of attempted overthrow of the Government, the Court of Appeals said (A. App. 204):

> "Where a conspiracy to destroy the Government by force or violence is involved,* we think that the 'clear and present danger' concept, as defined in *Dennis* (183 F. 2d at p. 212, 341 U. S. at p. 510), connotes no more than that the setting in which the defendants have

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* This case does not, of course, involve "a conspiracy to destroy the Government by force or violence." It involves a conspiracy to *teach and advocate* such overthrow, and no more.

conspired is such as to lead reasonably to the conclusion that their teachings may result in an attempt at overthrow."

If we understand this language aright, it means that the mere *possibility* "that (petitioners') teachings may result in an attempt at overthrow" is sufficient to support the application of the Smith Act to them. It is a rejection of *probability* as the measure of constitutional application. Indeed, it is a repudiation, in all but name, of "clear and present danger" as the standard of guilt. If we are right in this, the decision of the court below cannot stand, for it runs counter not only to all the decisions of this Court which preceded *Dennis*, but to *Dennis* itself.

However, even if the court below intended no more than a restatement in its own words of the clear and present danger rule as enunciated in *Dennis*, its decision cannot stand, because it erroneously rejected petitioners' contention, based on incontrovertible evidence, that there was no probability, at the time of their indictment, that their teaching and advocacy would result in an attempt at the overthrow of the Government.* The importance of this question in the application of the Smith Act to members and officers of the Communist Party is obvious. For if petitioners' contention is valid, there is no basis for the many pending and contemplated prosecutions of Communists under that Act.

The theory of the prosecution, as stated by Government counsel in his summation to the jury, was that "the time at which these defendants and their co-conspirators will attempt to seize power by forcibly overthrowing our existing government is a time of national crisis * * * such as a severe economic depression or a war" (Tr. 15429). "[T]hey teach that the revolution will come when a revo-

* This contention and the evidence relied on to support it are presented for the first time in this case. They were not presented in either the *Dennis* case or in *United States* v. *Frankfeld*, 4 Cir., 198 F. 2d 679, cert. den., 344 U. S. 922.

lutionary situation exists. They are preparing the subjective conditions themselves, that is, the ability of what they call the politically conscious workers to drop, to topple over the capitalist state as soon as the objective conditions come about: Economic depression, war—they will lead the revolution" (Tr. 15431).

The trial judge adopted the prosecution's theory. Since there was nothing to indicate the probability of economic depression he predicated his finding of clear and present danger on the probability of war. For in explanation of that finding he said (Tr. 13671-13673):

> "Your motion to submit the question of clear and present danger to the jury is denied. I consider that I have sufficient before me in the record and in the material of which I am entitled to take judicial notice to make the determination of clear and present danger, but for your benefit I will be glad to advise you what the facts are of which I am taking judicial notice.
>
> "They are, in substance, those of which Judge Hand and the United States Supreme Court took judicial notice, brought up to date.
>
> "Supplementing the facts of which there is evidence, I take judicial notice that on June 20, 1951, when the indictment was found, Russia, by far the most powerful of European nations, had been a convert to communism for over 30 years; its leaders were the most devoted and potent proponents of the faith; no such movement in Europe of East to West had arisen since Islam. In most of West Europe there were important political Communist factions, always agitating to increase their power. In Asia the Chinese Nationalist Government had been driven out by the Communists whose government had overrun the government of Tibet and was supporting with men and munitions the North Korean side of a war where the opposing South

Korean side was supported by an army of the United Nations, of which the United States was the principal supporter. Communists were fighting against the English in Malaya and the French in Indo-China. The status quo hastily contrived in 1945, was showing strains and tensions, not originally expected. The situation in Berlin had not improved since the airlift had saved Britain, France and the United States from being forced out, contrary to the United States Government's understanding of the convention by which we were there. The United States had become the object of invective upon invective; we were continuously charged with aggressive designs against other nations; our efforts to re-establish their economic stability were repeatedly set down as a scheme to enslave them; we had been singled out as the chief enemy of the faith; we were the eventually doomed, but the still formidable protagonist of that decadent system which it was to supplant. Any border fray, any diplomatic incident, any difference in construction of the modus vivendi—such as the Berlin blockade which we have just mentioned—might prove a spark in the tinder-box, and lead to war of survival in extension of or in addition to the war in which we were engaged in Korea."

There is no evidence, either in or outside the record, that the principles of Marxism-Leninism, or that the Communist Party or any of its officers or members, ever taught that war or severe economic depression would alone provide the occasion for the attempted overthrow of *any* government. The petitioners showed, on the contrary, by evidence that is incontrovertible, that even if it could be said that the principles of Marxism-Leninism and the Communist movement teach and advocate the forcible and violent overthrow of government in *some* circumstances, they

do not teach or advocate that either severe economic depression or war *alone* will provide the occasion for such an undertaking.* On the contrary, under Marxist-Leninist theory, revolution, whether peaceful or otherwise, is not something that depends on any one event such as economic depression or war, even when the war is one which Communists regard as an imperialist war. The prerequisite to revolution is a *revolutionary situation,* which comprehends a host of precisely defined objective factors that are altogether independent of the will of parties and even of whole classes. Moreover, not every revolutionary situation leads to revolution. For in addition to the objective factors which Marxism-Leninism regards as necessary to a revolutionary situation, there must also be present those factors which the theory denominates as "subjective", i.e., "the ability of the revolutionary classes to carry out revolutionary mass actions strong enough to break or to undermine the old government."

Lenin made all this quite explicit in a series of articles and speeches from which extensive quotations are to be found in the Appendix to this Petition at pages 85-94 and 144-145. The subjective and objective conditions which they specify as indispensable prerequisites to the revolutionary overthrow of even the most tyrannical of governments may be summarized as follows: That the party which leads the revolution should "enjoy the sympathy of the majority of the people, as proved by definite facts"; that "the development of events in the revolution has * * * led to the virtual dissipation of the illusions of compromise entertained by the petty bourgeoisie"; that "in the army in time of war sentiments hostile to a government which

* Indeed, petitioners adduced evidence to show that the doctrines of Marxism-Leninism, as they have evolved and developed since the Nazis came to power in Germany in 1933, teach and advocate that in countries which provide channels for the peaceful expression and effectuation of the popular will, the working class and its allies can and should seek to win governmental power by peaceful means.

drags out an unjust war against the will of the people have * * * become fully matured"; that "the advanced workers are * * * convinced of the desperate situation of the masses and of the support of the countryside, as demonstrated by an energetic peasant movement, or by a revolt against the landlords and against the government that defends the landlords"; that "the economic situation in the country offers (no) real hope of a favorable solution of the crisis by peaceful and parliamentary means" (6 Lenin, *Selected Works,* p. 321-322; DE NNN 6 id; quoted in *Schneiderman* v. *United States,* 320 U. S. 118, 156, note 51); that the "revolutionary party has * * * a majority among the front ranks of the revolutionary classes and in the country generally"; that "the old government * * * shall have reached a stage of complete moral and political bankruptcy" (6 Lenin, *Selected Works,* p. 293; DE NNN 6 id.); the "impossibility for the ruling classes to maintain their power unchanged"; "a crisis in the policy of the ruling class"; "the wants and sufferings of the oppressed classes become more acute than usual"; "a considerable increase in the activity of the masses who in 'peace time' allow themselves to be robbed without protest, but in stormy times are drawn both by the circumstances of the crises and by the 'higher-ups' themselves into independent historic action"; "the ability of the revolutionary classes to carry out revolutionary mass actions strong enough to break or to undermine the old government" (18 Lenin, *Collected Works,* pp. 279-280; DE 4 x H).

Above all must it be appreciated that nothing of Marxism-Leninism can be understood unless it is grasped that at the heart thereof lies the concept which Lenin expressed over and over again, namely, that: "In order to obtain the power of state the class conscious workers must win the majority to their side" (6 Lenin, *Selected Works,* 29; DE NNN 6-C). "[W]e do not want to 'usurp' power, for the whole experience of revolution teaches that only a

power that is backed by the majority of the people can be durable" (Lenin, *War and the Workers,* 29; DE OOO 24-A).

That Marxism-Leninism does *not* teach that war—even one which Communists regard as an imperialist war—can alone provide the occasion for governmental overthrow, is conclusively shown by the following quotation from a speech made by Lenin at a Party conference held in May, 1917, during World War I (6 Lenin, *Selected Works,* 95; DE NNN 6 id):

> "*Some may ask*: *Have we not repudiated our own principles? We advocated the transformation of the imperialist war into a civil war—are we not going back on ourselves?* But the first civil war in Russia has ended; we are now passing to a second war—a war between imperialism and the armed people. In this transitional period, as long as the armed force is in the hands of the soldiers, *as long as Milyukov and Guchkov have not resorted to violence, this civil war, as far as we are concerned, turns into peaceful, prolonged, and patient class propaganda.* If we speak of civil war before people have come to realize its necessity, we shall certainly be guilty of Blanquism. We are for civil war, but only when it is waged by a class conscious of itself. *Only he who is known to the people as a despot can be overthrown.* But there are no despots now: the guns and rifles are in the hands of the soldiers, and not the capitalists; the capitalists are getting their way now not by violence, but by fraud. To cry out against violence now is nonsense. *One must be able to regard matters from the Marxist standpoint, which says that the transformation of the imperialist war into a civil war is based on objective and not on subjective factors.*" (Emphasis added.)

The upshot of all the foregoing is that the principles of Marxism-Leninism *expressly prohibit and exclude* all attempts at the violent overthrow of any government, even of one which has closed all constitutional and peaceful channels for the expression of the popular will, unless and until the many subjective and objective factors, in addition to imperialist war or severe economic depression, exist. This is not only a theoretical principle. For the evidence referred to below shows that the Communist movement everywhere conforms its practice to this principle, in obedience to what is itself a fundamental principle of Marxism-Leninism, i.e., that there must be unity between theory and practice.*

It would therefore seem clear, and petitioners so argued in the Court below, that the answer to the question whether there was any probability that the petitioners and their alleged co-conspirators would attempt the overthrow of the Government would have to turn on the answers to *these* questions: (1) What circumstances, if any, did the petitioners and their alleged co-conspirators contemplate or teach as the circumstances in which an attempt at such overthrow might be made? (2) Was there a probability at the time of the indictment that such circumstances would occur?

The Court below rejected the argument, saying (A. App. 204):

> " * * * [T]he argument rests upon a misconception of what this Court and the Supreme Court have held as to the meaning of 'clear and present danger,' and as to

* Stalin, in his *Foundations of Leninism*, GE 4, p. 26, expressed the Marxist-Leninist requirement of unity of theory and practice in these terms: "Revolutionary theory is the generalization of the experiences of the labour movement in all countries. It naturally loses its very essence if it is not connected with revolutionary practice, just as practice gropes in the dark if its path is not illumined by revolutionary theory. But theory can become the greatest force in the labour movement if it is indissolubly bound up with revolutionary practice, for it alone can give to the movement confidence, guidance, strength and understanding of the inner relations between events; it alone can help practice to clarify the process and direction of class movements in the present and near future.

what the lower Court found in that respect. 'Clear and present danger' does not mean, as appellants' argument seems to suggest, that the trial Court must find that the alleged conspirators have agreed upon a precise set of circumstances under which they will attempt to strike down the Government, and, further, the existence or likely existence of those particular circumstances. In the very nature of things those who advocate the violent overthrow of the Government cannot themselves foresee the future so clearly as to forecast the particular conditions under which it may seem to them propitious to strike at the established authority. Indeed, the appellants themselves argue in connection with their assertion that Communism has cast aside its revolutionary doctrines that the Marxist-Leninist teachings are flexible enough so as to be adaptable to changing sets of circumstances."

With deference we submit that the foregoing does not answer petitioners' contention; it avoids it. The charge against these petitioners is that they were adherents of and agreed to teach and advocate the principles of Marxism-Leninism, which the Government contends include the teaching and advocacy of the overthrow of the Government of the United States by force and violence. Now, it would seem clear that if this body of theory teaches that an attempt at governmental overthrow may be made *only* when a host of specified conditions, both subjective and objective, concur—and expressly precludes and prohibits such an attempt in the absence of any of such conditions—the probability of an attempt at overthrow by the adherents of that theory can be said to exist only to the extent that there is a probability that the conditions prerequisite to such an attempt will arise. This must be so, unless there is ground for saying that the alleged conspirators did not really intend to make an attempt at overthrow dependent

on the occurrence of such conditions. For, in the absence of such ground, it is only on the basis of the agreement actually made by the alleged conspirators, that one can say whether or not there is any probability that they will act. Hence, if they have agreed to act *only* in the context of certain conditions and *not* to act in their absence, it is obvious that the probability of their acting *must* be measured by the probability of the occurrence of the conditions they have set for their acting.

The Court below rejected petitioners' contention on two grounds: (1) That "in the very nature of things those who advocate the violent overthrow of the Government cannot themselves foresee the future so clearly as to forecast the particular conditions under which it may seem to them propitious to strike at the established authority" (A. App. 204). (2) That the petitioners "themselves argue in connection with their assertion that Communism has cast aside its revolutionary doctrines that the Marxist-Leninist teachings are flexible enough so as to be adaptable to changing sets of circumstances" (A. App. 204).

The first of the aforementioned grounds has already been answered. If people have agreed to act only upon the occurrence of certain events—and there is nothing, as there is nothing here, to indicate that they intend to do other than act in accordance with their agreement—one cannot possibly disregard that agreement and assume that they will act contrary thereto on the *abstract theory* that "in the very nature of things those who advocate the violent overthrow of the Government cannot themselves foresee the future so clearly as to forecast the particular conditions under which it may seem to them propitious to strike at the established authority."

The conditions which Marxism-Leninism attaches to an attempt at governmental overthrow are founded on its study and interpretation of past history. (Cf. 18 Lenin, *Collected Works*, 279-280, DE 4 x H.) Marxism-Leninism

teaches that "the connection and interdependence of the phenomena of social life are laws of the development of society, and not something accidental"; that "hence social life, the history of society, ceases to be an agglomeration of 'accidents', and becomes the history of the development of society according to regular laws, and the study of history of society becomes a science"; and that "*hence the practical activity of the party of the proletariat must not be based on the good wishes of 'outstanding individuals', not on the dictates of 'reason', 'universal morals', etc., but on the laws of development of society and on the study of these laws*" (*History of the Communist Party of the Soviet Union*, 114; GE 9). For Marxist-Leninists, therefore, the conditions which their theory places upon an attempt at governmental overthrow express a law of social and historical development. It is, therefore, an utterly unwarranted assumption that they will depart from or violate it.

The second of the grounds on which the Court below rejected petitioners' contention was, that even if account is to be taken of the conditions which Marxism-Leninism defines as the prerequisites to an attempt at governmental overthrow, these conditions may be disregarded because petitioners "themselves argue in connection with their assertion that Communism has cast aside its revolutionary doctrines, that the Marxist-Leninist teachings are flexible enough so as to be adaptable to changing sets of circumstances." Marxism-Leninism has, indeed, taught and advocated, since the Nazis came to power in Germany in 1933, that in countries which provide channels for the peaceful expression and effectuation of the popular will, the working class and its allies can and should seek to win governmental power by peaceful means. But this development, far from presaging an abandonment or dilution of the teachings which prohibit an attempt at governmental overthrow except in the extreme conditions which they specify, necessarily implies an even firmer adherence to them. For if the

theory, as it has developed in recent years, envisages the possibility of the peaceful accession of the working class to governmental power, it necessarily follows that the restraints which the theory places upon violent overthrow must be observed at least to the same extent that they were in those countries, e.g., Russia, where peaceful accession to power was thought to be impossible.

It cannot be disputed that there was no probability, at the time of petitioners' indictment, of the occurrence in the United States of the conditions which Marxist-Leninism attaches to an attempt at governmental overthrow. It therefore follows, if we are right in what we have heretofore said, that there was no probability, at that time, that the petitioners and their alleged co-conspirators would attempt the overthrow of the Government. Indeed, the prosecution's cruelly emasculated version of Marxism-Leninism and of the teaching and advocacy of the Communist Party of the United States, i.e., that overthrow of the Government should be attempted "as soon as the objective conditions come about: economic depression, war", is to be explained only on the hypothesis that it was aware that it could not establish the probability of the occurrence of the many factors, subjective and objective, which under Marxism-Leninism are prerequisites to revolution.

The evidence which petitioners adduced in the Court of Appeals to support their contention that Marxism-Leninism does not permit of an attempt at governmental overthrow except in the extreme conditions which it specifies, was not confined to the written word. They showed, in addition, that in the United States and in those countries to which the trial judge made reference in his finding of a clear and present danger—Russia, France, Italy and China—Communist practice has always conformed to these teachings of Marxism-Leninism. The evidence which petitioners adduced in support of this showing was voluminous. We shall therefore summarize it in the briefest form here, respect-

fully suggesting that if the Court desires to examine the evidence as presented to the Court below it will find same in one of the briefs filed by petitioners in the Court of Appeals, which is submitted as an Appendix to this Petition, at pages 95-139. The evidence we refer to showed the following in respect to each of the countries named below:

France: The economic and financial plight of both the government and the overwhelming majority of the French people, since the end of World War II, has become an international byword. Only recently did France's 8-year war in Indo-China come to an end. It has been in a state of "perennial political crisis." It has had at least 18 changes of ministry in the 9 years that have elapsed since the end of World War II. During all this time the Communist Party of France has been "numerically the strongest party." In each national election it has polled at least 5,000,000 votes. Of the 627 deputies in the National Assembly, 101 are Communists. In addition, the Communists control France's largest labor organization, the Confederation Generale de Travail (CGT) (Appendix to this Petition, 98-101).

France is obviously a country which, to use the words of Judge LEARNED HAND in the *Dennis* case, 183 F. 2d at p. 213, has been "so far extended by foreign engagements, so far divided in counsel, (and) so far in industrial (and) financial straits", that if the theory of the prosecution and the trial judge had anything to commend it, we should have expected the Communists of France to have long since called for or attempted the violent overthrow of the government of France. But they have not done so. On the contrary, they have sought only a united front for the purpose of achieving "a government of moral purity and peace", "a stable government, a government of democratic unity relying on the confidence of the people" (Appendix to this Petition, 115-116).

Italy: The situation in Italy since the end of World War II has not been materially different from that in France. It has been described by Ugo La Malfa, Minister for Foreign Trade in the de Gasperi cabinet, as being "socially, economically and politically one of the 'borderline' countries where the battle between democracy and everything that is anti-democratic is a touch-and-go affair." Its "fundamental problem is still what it was at the time of national unification, a problem of glaring contrasts. The manifestations of a long-standing culture stand beside the evidences of long-lasting poverty." It has an acute unemployment problem which, it has been said, "predominates in Western Europe because of its size." Its trade deficit runs into the hundreds of millions of dollars, and its national budget "is expanding beyond the point of safety." In January, 1953, Mr. La Malfa summed up the Italian situation in these words: "It is a time of crisis, with all the dangers that the word connotes" (Appendix to this Petition, 106-110).

In the national election held in June, 1953, the Communist Party polled 6.1 million votes, which represented 22.6% of all the valid votes cast in the election. Of the 590 deputies elected in that year, 143 were Communists. In addition, the Communist Party of Italy, like that of France, enjoys great influence in the organized labor movement (Appendix to this Petition, 110). But the Communists of Italy have not called for the violent overthrow of the government of Italy. On the contrary, like the Communists of France, they have sought a governmental change only through the electoral process. Thus at a meeting of the National Council of the Communist Party of Italy, held as recently at April, 1953, its general secretary, Palmiro Togliatti, said in the course of a report on the then impending national election (Appendix to this Petition, 116):

"What we demand, and for this we address ourselves to the Italian electorate, is to achieve through the

medium of the election a situation which would permit the formation of a government capable of launching and of carrying through a great, incessant and effective struggle against poverty, against the growing privations of the worker, office employee, handicraftsman, peasant, against the economic degradation of Southern Italy and the islands, the mountain areas and other poorly developed areas."

China: In support of his finding of clear and present danger, the trial judge said that "in Asia the Chinese Nationalist Government had been driven out by the Communists" (*supra*, 34). Even if it were valid to assume, as the trial judge did, that when, in 1949, the Chinese Communists acceded to governmental power, they did so as a consequence of the violent overthrow of the Nationalist Government, it would not invalidate anything we have said concerning the teachings of Marxism-Leninism or the practices of Communist Parties under that theory. The evidence which petitioners laid before the Court of Appeals showed that for a quarter of a century prior to their accession to power, the Chinese Communists had sought by peaceful means to achieve a coalition government which would include both the Communists and the Kuomintang. In 1924 the Communist Party formed a united front with the Kuomintang which was disrupted in 1927. In 1937, on the initiative of the Communist Party, a united front was once again formed between the two parties, which also came to an end sometime prior to 1944. In the latter year the Communist Party once again proposed to the Kuomintang the setting up of a democratic, coalition government. But it refused. The Communists charged that their proposals for such a government were rejected because the Kuomintang Government "was unwilling not only to end the one-party rule and set up a coalition government but

also to effect any necessary democratic reforms." That the Nationalist Government of China "had always been a one-party rather than a democratic Government in the Western sense," was attested by our own State Department. (*United States Relations with China*, Department of State Publication 3573, August, 1949, p. VII.) Both the government and the Kuomintang which controlled it had, long before their disappearance from the stage in 1949, "sunk into corruption, into a scramble for place and power" (*ibid.*, p. VII), while they failed to provide the people "with enough to eat" (*ibid.*, p. V). In consequence, "the mass of the Chinese people were coming more and more to lose confidence in the Government" (*ibid.*, p. VII). "The fact was that the decay which our observers had detected in Chungking early in the war had fatally sapped the powers of resistance of the Kuomintang. Its leaders had proved incapable of meeting the crisis confronting them, its troops had lost the will to fight, and its Government had lost popular support" (*ibid.*, p. XIV). In summarizing the conditions which brought the Communists to power in China, the Department of State said (*ibid.*, pp. XIV; XV):

> "The reasons for the failures of the Chinese Nationalist Government appear in some detail in the attached record. They do not stem from any inadequacy of American aid. Our military observers on the spot have reported that the Nationalist armies did not lose a single battle during the crucial year of 1948 through lack of arms or ammunition. The fact was that the decay which our observers had detected in Chungking early in the war had fatally sapped the powers of resistance of the Kuomintang. Its leaders had proved incapable of meeting the crisis confronting them, its troops had lost the will to fight, and its Government had lost popular support. The Communists, on the

other hand, through a ruthless discipline and fanatical zeal, attempted to sell themselves as guardians and liberators of the people. The Nationalist armies did not have to be defeated; they disintegrated. History has proved again and again that a regime without faith in itself and an army without morale cannot survive the test of battle."

Russia: In the *Dennis* case, Mr. Justice JACKSON said, 341 U. S. at 565: "The Communist recognizes that an established government in control of modern technology cannot be overthrown by force until it is about ready to fall of its own weight. Concerted uprising, therefore, is to await that contingency and revolution is seen, not as a sudden episode, but as the consummation of a long process." In support of this thesis, he wrote of the two Russian revolutions of 1917 in these terms, 341 U. S. at 565, note 7:

"The Czar's government, in February 1917, literally gave up, almost without violence, to the Provisional Government, because it was ready to fall apart from its corruption, ineptitude, superstition, oppression and defeat. The revolutionary parties had little to do with this and regarded it as a bourgeoisie triumph. Lenin was an exile in Switzerland, Trotsky in the United States, and Stalin was in Siberia. The Provisional Government attempted to continue the war against Germany, but it, too, was unable to solve internal problems and its Galician campaign failed with heavy losses. By October, its prestige and influence sank so low that it could not continue. Meanwhile, Lenin and Trotsky had returned and consolidated the Bolshevik position around the Soviets, or trade unions. They simply took over power in an almost bloodless revotion between October 25 and November 7, 1917. * * *"

Germany: In Boudin, *"Seditious Doctrines" and the "Clear and Present Danger" Rule,* 1952, 38 Va. Law Rev. 143, 343-344, it is said:

> "That the Communists were not ready to overturn a legitimately established government by force and violence even in times of crisis, and certainly could not do so, is further shown by the fact that although the German Communist Party was the strongest Communist group outside of Russia in 1932* it yet did not attempt to prevent Hitler's assumption of power by using its supposedly well disciplined organization, and this notwithstanding the existence of the 'mighty' Soviet Union. Further, it must be borne in mind that Hitler assumed power in a time of economic crisis, a crisis which embraced the entire capitalist world, when there were six million unemployed in Germany. Nor did they attempt to institute revolution in any country of Western Continental Europe where their parties had more adherents and their influence in the labor movement was far greater than they could hope to have or possess in the United States at any time in the near future."

United States: That there has never been any danger of attempt at violent overthrow of the Government of the United States by the Communists—either in severe economic depression, time of war, or any other time—is attested by our own history. Thus does Boudin say in the article above cited (38 Va. L. Rev. 143, 344):

> "That the puny American party with its meager influence in the United States never dreamed of instituting a revolution when we were in the same economic crisis

* Footnote 134 at this point in Boudin's article reads as follows: "The Party polled some five million votes in the presidential election of 1932 out of a total of thirty-five millions, or about fifteen percent of the total vote."

(i.e., in the 1930's) is, of course, a matter of history. This, notwithstanding the fact that at that time (1) they enjoyed a certain amount of respectability, at least among the intellectuals; (2) the number of unemployed in this country was between twelve and fifteen millions; and (3) the farmers of Iowa and other communities were in revolt, though not in revolution. In short, in the words of Justice Brandeis, this country was 'confronted with an emergency more serious than war'."

And what has the Party taught and advocated in time of what it has regarded as an imperialist war? The record is clear. The fact is that although the Communist Party of the United States thought that our huge post-war armaments and expenditures would lead to "a catastrophic economic and financial crash" (DE 8 x E-9, *Political Affairs*, Oct. 1950, 68), and although we had, at the date of the indictment herein, been engaged for almost a year in the war in Korea—a war which the Party regarded and described as "an unjust, imperialist war" (DE 8 x E-7, *Political Affairs*, Oct. 1950, 45)—not a single word was said, nor a single act done, by or on behalf of the Communist Party, which even the grossest distortion could convert into advocacy or threat of violent overthrow of the Government of the United States. On the contrary, the uncontroverted evidence is that throughout the Korean War, the Communist Party of the United States advocated only the pursuit of peaceful and constitutional means to bring the hostilities to an end and to lay a basis for universal peace. Thus, in October, 1950, *Political Affairs* published an article by petitioner Weinstone which declared that "it is imperative to point out that peace with the Soviet Union is not only desirable and necessary, but entirely possible" and that "it is necessary * * * to urge the workers and the people generally along the path of inde-

pendent political action" (DE 8 x E-7, 45). In the same issue of *Political Affairs* appeared an article by petitioner Bittelman which, at p. 74, declared (DE 8 x E-10):

> "The Communist Party will especially stress the need for *unity*, unity of action for the immediate and burning economic and political demands of the masses regardless of ideology or political affiliation. We will fight with the utmost concentration for the workers' united front and the people's front against war and fascism, for the broadest coalition in the fight for peace, for working-class unity in the struggle to defend the people's living standards, civil liberties and equal rights." (Italics in original.)

The evidence shows that particularly since the end of World War II, the Communist Party of the United States, in common with Communist Parties the world over, has envisaged and advocated the peaceful accession of the working class and its allies to governmental power on the basis of the election of a people's front government. For the teaching and advocacy of the Communist Parties of Great Britain, Australia and Canada, the Court is respectfully referred to pages 117-122 of the Appendix to this Petition. How the Communist Party of the United States envisages and teaches that a people's front government could come into being on the basis of a people's coalition and evolve, in an altogether lawful way, into one that could ultimately introduce socialism in the United States was articulated by William Z. Foster, Chairman of the Party, two years before the return of the indictment herein, in his book, *The Twilight of World Capitalism*, portions of which were received in evidence on the trial herein as DE SS-1-2 (Appendix to this Petition, 124-127); and by petitioner Elizabeth Gurley Flynn in her testimony at the trial herein (Appendix to this Petition, 128-130).

In conclusion, it is pertinent to observe that the trial judge's finding of clear and present danger was predicated on the apprehension that: "Any border fray, any diplomatic incident, any difference in construction of the modus vivendi * * * might prove a spark in the tinder-box, and lead to war of survival in extension of or in addition to the war in which we were engaged in Korea" (*supra*, p. 35). In what has preceded we have demonstrated that even if these apprehensions of a possible future war were well-founded, there was no probability that these petitioners and their alleged co-conspirators would attempt the overthrow of the Government. Now not even the apprehension of war remains to support these convictions. For even as we write these lines we hear the President of the United States proclaim to a war-weary world his confidence in the possibility of permanent peace, in these words (Address to National Council of Catholic Women, *New York Times*, November 9, 1954, p. 14):

> "The fathers and mothers of our land rejoice that the possibility of permanent peace is more promising than in any time in recent years."

III

The evidence was insufficient in law to establish each petitioner's guilt beyond a reasonable doubt.

The petitioners moved for acquittal at the close of the Government's case (Tr. 9751), as well as at the close of the entire case (Tr. 13760), on the ground that the evidence was insufficient to establish their guilt. While petitioners' brief in the Court of Appeals did not devote any one specific point exclusively to the question of the sufficiency of the evidence, the contention was made over and over again throughout the brief, particularly with reference to (a) the

nature and content of the teaching and advocacy of the Communist Party, (b) petitioners' intent to teach or advocate and bring about forcible and violent overthrow of the Government, (c) whether there was a clear and present danger of such overthrow (Appendix to this Petition, 81, 82, 84-85, 111, 140-144).

The indictment charged that from on or about April 1, 1945, until the filing of the indictment on June 20, 1951, petitioners were engaged in a conspiracy with the *Dennis* defendants and other unknown persons "(1) unlawfully, wilfully, and knowingly to advocate and teach the duty and necessity of overthrowing and destroying the Government of the United States by force and violence; and (2) unlawfully, wilfully, and knowingly, to organize and help to organize as the Communist Party of the United States of America a society, group and assembly of persons who teach and advocate the overthrow and destruction of the Government of the United States by force and violence" (A. App. 4-5).

The theory of the prosecution was that prior to 1944 the Communist Party taught and advocated the principles of Marxism-Leninism which, according to the prosecution, taught and advocated the forcible and violent overthrow of the Government of the United States; that in May, 1944, the Communist Party was dissolved and its place taken by the Communist Political Association, which latter organization adopted a program that was one of cooperation between labor and management and, in general, one designed to achieve national unity and peace and prosperity in the post-war period; and that in 1945, the Communist Political Association was dissolved and the Communist Party reconstituted, pursuant to a conspiracy to teach and advocate the forcible and violent overthrow of the Government by returning the Party to the basic principles of Marxism-Leninism. There was no evidence in this case of

an express agreement either among the petitioners or between the petitioners and anybody else to teach and advocate forcible and violent overthrow of the Government or to reconstitute the Communist Party for that purpose. In the context of this case, the absence of such evidence is persuasive that the conspiracy charged was altogether nonexistent. For among the Government's witnesses there were two—Budenz and Lautner—whose positions and activities within the Communist Party were of such character and importance, that, had there been such an agreement, they would certainly have known of it and, hence, testified to it. But they gave no such testimony.

The theory on which the Government predicates the guilt of the petitioners is: That during the conspiracy period the Communist Party taught and advocated the principles of Marxism-Leninism; that these principles teach and advocate the overthrow of the Government of the United States by force and violence; and that an agreement to teach and advocate such violent overthrow may be attributed to the petitioners on the strength of their membership and positions in the Communist Party and their activities in its behalf. Basically the Government's contention is that the principles of Marxism-Leninism and their teaching and advocacy of the forcible and violent overthrow of the Government of the United States are to be found in the writings of Marx, Engels, Lenin and Stalin. It placed its main reliance on the following writings: *The Communist Manifesto* by Marx and Engels (1848); *State and Revolution* by Lenin (1917); *Foundations of Leninism* by Stalin (1924); and *History of the Communist Party of the Soviet Union (B)* (1939).

With the exception of the last-named work, these were the same writings which were considered by this Court in *Schneiderman* v. *United States*, 320 U. S. 118, where the Government sought to cancel Schneiderman's certificate

of citizenship on the ground that he had not, at the time of his procurement thereof in 1927 and during the five years immediately preceding that date, behaved as a person attached to the principles of the Constitution of the United States. The Government contended that Schneiderman believed, during that period, in the forcible and violent overthrow of the Government of the United States. To support that contention, it showed that the aforementioned writings and the principles contained in them were taught and advocated by the Communist Party during the five years preceding 1927. It maintained that these writings taught and advocated violent overthrow of the Government of the United States. And it argued that since Schneiderman avowed his adherence to the teaching and advocacy of the Communist Party, and had during the five years preceding 1927 been a member of and held positions in the Party, belief in the forcible and violent overthrow of the Government was imputable to him. Its contention, as stated in the opinion of the Court, was (320 U. S. at 147):

> "• • • [T]hat it is proper to impute to petitioner certain excerpts from the documents in evidence upon which it particularly relies to show that advocacy of force and violence was a principle of the Communist Party of the United States in 1927, because those documents were official publications carefully supervised by the Party, because of the Party's notorious discipline over its members, and because petitioner was not a mere 'rank and file or accidental member of the Party' but 'an intelligent and educated individual' who 'became a leader of these organizations as an intellectual revolutionary'."

This Court rejected the contention. Noting that the Government itself had conceded "the presence [in Marxist-Leninist writings] of sharply conflicting views on the issue

of force and violence as a Party principle" (320 U. S. at 148), the Court said (320 U. S. at 157; 158):

> "A tenable conclusion from the foregoing is that the Party in 1927 desired to achieve its purpose by peaceful and democratic means, and as a theoretical matter justified the use of force and violence only as a method of preventing an attempted forcible counter-overthrow once the Party had obtained control in a peaceful manner, or as a method of last resort to enforce the majority will if at some indefinite future time because of peculiar circumstances constitutional or peaceful channels were no longer open. * * *
>
> "In so holding we do not decide what interpretation of the Party's attitude toward force and violence is the most probable on the basis of the present record, or that petitioner's testimony is acceptable at face value. We hold only that where two interpretations of an organization's program are possible, the one reprehensible and a bar to naturalization and the other permissible, a court in a denaturalization proceeding, assuming that it can re-examine a finding of attachment upon a charge of illegal procurement, is not justified in canceling a certificate of citizenship by imputing the reprehensible interpretation to a member of the organization in the absence of overt acts indicating that such was his interpretation."

If this is true in a denaturalization proceeding, it must *a fortiori* be true in a criminal case where personal guilt must be established beyond a reasonable doubt. On principle it would, therefore, be impermissible to impute to these petitioners solely on the basis of their membership and positions in the Communist Party, a belief that the principles of Marxism-Leninism teach and advocate the

violent overthrow of the Government. Moreover, to do so would violate section 4(f) of the Internal Security Act of 1950, 64 Stat. 992, 50 U.S.C. 783(f), which provides: "Neither the holding of office nor membership in any Communist organization by any person shall constitute per se a violation of subsection (a) or subsection (c) of this section *or of any other criminal statute.*"

The Government, therefore, sought to charge the petitioners with a reprehensible interpretation of Marxism-Leninism through the device of an "expert" opinion as to the meaning of that term. Hence, on the direct examination of Budenz, it asked him to state the meaning of the following sentence in the preamble to the Constitution adopted at the 1945 convention at which the Party was reconstituted: "The Communist Party of the United States is the political party of the American working class, basing itself on the principles of scientific socialism, Marxism-Leninism." And his answer was (Tr. 2204-05):

> "Marxism-Leninism historically and conventionally in the Communist movement and as used and understood is the science of society or so-called science of society represented in the teachings of Marx, Engels, Lenin and Stalin, particularly as supplemented and defended by Lenin and Stalin, the foundation or backbone of which is the violent shattering of the governments of the bourgeois states and the setting up of a dictatorship of the proletariat by force as stated by Lenin in State and Revolution, and Stalin in the Foundations of Leninism. This applies to the Government of the United States under the constitution as that ready-made state machinery developed to a point of imperialist perfection which must be smashed as Lenin and Stalin have both stated."

This was not a definition that Budenz had obtained from any of the petitioners or from any of their alleged co-

conspirators. For he did not attribute it to any of them. It apparently rested on nothing more than his own interpretation of the writings of Marx, Engels, Lenin and Stalin. As such, it was impotent to remove what this Court, in *Schneiderman, supra,* called "the presence [in Marxist-Leninist writings] of sharply conflicting views on the issue of force and violence as a Party principle" (320 U. S. at 148).

In further attempted support of its imputation to these petitioners of a "reprehensible interpretation" of Marxism-Leninism, the Government placed major emphasis on the circumstances leading to and surrounding the dissolution of the Party in 1944 and its reconstitution in 1945. Its theory was that the Party was dissolved during the war, in 1944, and the Communist Political Association formed in its place, because American Communists thought it "necessary that Communists should indicate that they were not at that time raising the question of socialism in the United States, that this drastic change should be made in the name of national unity so that it would appear that communism was diminishing in the United States" (Tr. 15262-63); and that when the Party was reconstituted at the national convention of the Communist Political Association in July, 1945, "this fine idea of national unity and class peace (was) abandoned", for the purpose of teaching and advocating the overthrow of the Government by force and violence (Tr. 15264). The Government contended that the Party was reconstituted for this purpose "as a direct result" of an article by Jacques Duclos, Secretary of the French Communist Party, which severely criticized the previous dissolution of the Party (Tr. 15264). But there is absolutely nothing in that article (GE 13) which by the widest stretch of the imagination can be construed as suggesting that national unity be abandoned and replaced by the teaching and advocacy of violent overthrow of the

Government. For, far from criticizing American Communists for their desire for national unity, the article commended them, saying (GE 13):

> "Everyone understands that the Communists of the United States want to work to achieve unity in their country."

What the article condemned was the *dissolution* of the Party. And it did so because it regarded the dissolution as evidence that American Communists were seeking national unity by means which would not achieve it, i.e., by reliance on "the good will of the men of the trusts." Thus did the sentence immediately following the one quoted above say (GE 13):

> "But it is less understandable that they (American Communists) envisage the solution of the problem of national unity with the good will of the men of the trusts, and under quasi-idyllic conditions, as if the capitalist regime had been able to change its nature by some unknown miracle."

Duclos' view was that the war aim of the United States, Great Britain and the Soviet Union was to "liquidate fascism in Germany and to help the liberated peoples to liquidate the remnants of fascism in the different countries"; and that since "the material bases for fascism reside in the trusts", reliance on "the men of the trusts" for the achievement of the national unity necessary to victory over fascism was misplaced. Hence he wrote (GE 13):

> "After the Teheran decisions came the Yalta decisions which expressed the will of the Big Three to liquidate fascism in Germany and to help the liberated peoples to liquidate the remnants of fascism in the different countries.

"It is scarcely necessary to recall that the material bases for fascism reside in the trusts, and the great objective of this war, the annihilation of fascism, can only be obtained to the extent in which the forces of democracy and progress do not shut their eyes to the economic and political circumstances which engender fascism."

Indeed, it was precisely because Duclos regarded a virile Communist Party as a necessary instrument for the achievement of national unity, that he condemned the dissolution of the Communist Party of the United States. Thus did he say (GE 13):

"It is beyond doubt that if, instead of dissolving the Communist Party of the United States all had been done to intensify its activity in the sense of developing an ardent national and anti-fascist policy, it could very greatly have consolidated its position and considerably extended its political influence. On the contrary, formation of the Communist Political Association could not but trouble the minds and obscure the perspectives in the eyes of the working masses.

"In France, under cover of Resistance unity, certain suggestions for the liquidation of the party have been circulated, with more or less discretion, during the last months, but none among us has ever thought of taking such suggestions seriously. It is not by liquidating the Party that we would have served national unity. On the contrary we are serving it by strengthening our Party. And as far as the American Communists are concerned, it is clear that their desire to serve the unity of their country and the cause of human progress places before them tasks which pre-suppose the existence of a powerful Communist Party."

That this was how the Communists of the United States viewed the matter when they reconstituted the Party in 1945 is shown by the following quotation from the resolution which the reconstituting convention adopted (DE M, 95-96):

> "That is why today we Communists must not only learn from our achievements in the struggle against fascism and reaction, but also from our weaknesses and errors. In the recent period, especially since January, 1944, these mistakes consisted in drawing a number of erroneous conclusions from the historic significance of the Teheran accord. Among these false conclusions was the concept that after the military defeat of Germany, the decisive sections of big capital would participate in the struggle to complete the destruction of fascism and would cooperate with the working people in the maintenance of postwar national unity. The reactionary class nature of finance capital makes these conclusions illusory. This has been amply demonstrated by recent events revealing the postwar aims of the trusts and cartels which seek imperialist aggrandizement and huge profits at the expense of the people."

This did not, however, mean that cooperation with all capitalist groupings was excluded. For the same resolution declared (DE M, 89):

> "While cooperating with the patriotic and democratic forces from all walks of life, labor must, in the first place, strengthen its ties with the veterans, the working farmers, the Negro people, youth, women, intellectuals and small business men, and with their democratic organizations. *At the same time, while forging the progressive unity of the nation, labor should cooperate with those capitalist groupings and elements who, for one or another reason, objectively at times, promote democratic aims.*" (Emphasis added.)

That the purpose of the reconstitution of the Communist Party in 1945 was to permit it to function and work within the framework of our democracy, and not to teach and advocate the forcible and violent overthrow of the Government, is attested by the program which the reconstituting convention adopted based on the following slogans of action (DE M, pp. 90-93):

"1. Speed the defeat of fascist-militarist Japan" (p. 90);

"2. Complete the destruction of fascism and build a durable peace" (p. 90);

"3. Push the fight for sixty million jobs—meet the human needs of reconversion" (p. 91);

"4. Keep faith with the men who fight for victory" (p. 92);

"5. Safeguard and extend democracy" (p. 92);

"6. Safeguard the future of America's youth" (p. 93).

The purpose of the reconstitution of the Party was to forge a united front or coalition of anti-fascist and democratic forces, with a view to achieving governmental power for such a coalition through the electoral process. Thus did the resolution adopted by the 1945 convention declare (GE 22, p. 820):

"[I]t is of central importance to build systematically the political strength and influence of labor, the Negro people, and all true democratic forces within the general coalition for the struggle against imperialist reaction, for combatting and checking all tendencies and groupings in the coalition willing to make concessions to reaction. The camp of reaction must not be appeased. It must be isolated and routed. Toward this

end it is necessary, as never before, to strengthen decisively the democratic unity of the nation, to create that kind of national unity for the postwar period which will be able to facilitate the destruction of fascism abroad and to prevent fascism from coming to power in the United States. *Therefore, it is essential to weld together and consolidate the broadest coalition of all anti-fascist and democratic forces as well as all other supporters of Roosevelt's anti-Axis policies.*" (Italics in original.)*

Indeed, it was admitted by the Government's witness Lautner that the aforementioned resolution was intended to "set out a program which (the Communist Party) thought would provide a broad people's coalition to protect and extend democracy in the United States and defeat the threat of fascism" (Lautner, Tr. 5341). Lautner also admitted that from 1945, when the Communist Party was reconstituted, to 1950, when he was expelled from the Party, it "had a united front policy" (Tr. 5424). What is of even greater significance is that he admitted that prior to its dissolution in 1944, he had been taught in the Communist Party that a united front "might lead to the election of a united front government" in which "the Communist Party

* The resolution explicitly excluded the issue of socialism from the perspective adopted by the convention, for it stated (DE M, 94):

"While not yet accepting Socialism as an ultimate goal, the American people today agree that fascism must be destroyed, wherever it exists or wherever it raises its head. The American people are ready to protect and extend the Bill of Rights and all democratic liberties. They are determined to fight for greater peace and democracy, for the right to work, greater job and social security.

"Therefore, Communists and non-Communists, all progressives and anti-fascists can be rallied in support of the above program of immediate action. For this program meets the immediate desires of the American people upon which the majority can unite today to prevent the rise of fascism and to assure victory in the 1945 municipal elections and in the fateful 1946 congressional elections which must be organized and prepared for now. This is a program which must be championed in every factory and industry, in every community and state, through the medium of labor's political action; through labor's joint and parallel action locally, and through broad shop steward conferences and united community movements, as well as through other broad united peoples and democratic front activities."

would participate", and which "might be a transition government leading to control of the State by the working class under the leadership of the Communist Party" (Tr. 5412). Indeed, Lautner further admitted that "the Communist Party in the United States took the position that this united front government so elected can and will by lawful methods, carry through the transition to socialism in the United States" (Tr. 5423).*

The foregoing is of the profoundest significance in its bearing on the question of whether the evidence was sufficient to establish that any of these petitioners, by their participation in the reconstitution of the Communist Party, understood and intended that the Party's return to the principles of Marxism-Leninism meant the teaching or advocacy of violent overthrow of the Government. For, as we shall show in a moment, the theory that a united front policy "might lead to the election of a united front government" in which "the Communist Party would participate" and which "might be a transition government leading to control of the State by the working class under the leadership of the Communist Party", had, long before the dissolution and subsequent reconstitution of the Communist Party, become an integral part of the body of Marxist-Leninist principles.

If this was so, it would seem clear that, in the absence of competent evidence to show that each of these petitioners actually and specifically intended the Party to be recon-

* On redirect examination Lautner was asked to state "the position of the Communist Party from 1945 to 1950 with respect to the question of electing a united front government which would defend and preserve American democracy and advance toward the socialist reorganization of society" (Tr. 6323-24) and he said: "The Party's position was that the united front government would be a transition government that could not solve the contradictions of capitalism and that would lead to the proletarian revolution and the dictatorship of the proletariat" (Tr. 6328). This does not, however, negate anything hereinabove quoted from his cross-examination, for it is to be observed that he did not say that the united front government was to be overthrown by force and violence.

stituted for the purpose of engaging in the proscribed teaching and advocacy, there was no basis for their conviction*

In 1935 the Communist Internationale held its Seventh World Congress (Dimitroff, *United Front Against Fascism*, GE 29 id.; GE 30 id.; DE F id.). Before that time fascism had come to power in Germany, as well as in Austria and Italy, and was making strong bids for power in many other countries, including France. The Communist movement regarded fascism in power as "the open terrorist dictatorship of the most reactionary, most chauvinistic and most imperialist elements of finance capital" (GE 29 id., p. 6-7). Dimitroff, in his report to the Seventh World Congress, which that body adopted, described fascism in these terms: "Fascism is a most ferocious attack by capital on the toiling masses; Fascism is unbridled chauvinism and annexationist war; Fascism is rabid reaction and counter-revolution; Fascism is the most vicious enemy of the working class and of all the toilers" (GE 29 id., 11).

To combat the threat of fascism in countries in which it had not come to power, Dimitroff, therefore, proposed, and the Seventh World Congress adopted his proposal, that: "In the mobilization of the toiling masses for the struggle against fascism, the formulation of a *broad people's anti-fascist front on the basis of the proletarian united front* is a particularly important task. The success of the entire struggle of the proletariat is closely connected with the establishment of a fighting alliance between the proletariat on the one hand and the toiling peasantry and the basic mass of the urban petty bourgeoisie constituting a majority in the population of even industrially developed countries, on the other" (GE 29 id., pp. 36-37; italics in original).

* If it was true, as this Court held in *Schneiderman* v. *United States*, *supra*, that there were in Marxist-Leninist writings "sharply conflicting views on the issue of force and violence as a Party principle" as of 1927, *before the adoption of the united front policy in 1935*, what shall we say of the situation *since* then?

It was further envisaged that on the basis of such an anti-fascist people's coalition, embracing a majority of the population in each country, it would be possible to elect united or people's front governments which, as Dimitroff phrased it, would be "governments of struggle against fascism and reaction" (GE 29 id., p. 69).

That the teaching embodied in Dimitroff's above-mentioned report and writings was regarded by Communists as an integral part of Marxist-Leninist teaching and advocacy after 1935, and that they so regarded them at the time of the reconstitution of the Communist Party in 1945 and throughout the period covered by the indictment, is attested by the fact that when Eugene Dennis, in a report to the National Committee of the Communist Political Association in June, 1945, shortly prior to the reconstitution, urged the need for "the widest and most profound study of the Marxist-Leninist classics", he included "the reports and writings of Comrade Dimitrov" among them; indeed, he named them *first* in the list of classics which he recommended for such study. For he said (GE 15-D):

> "It is also especially urgent now that we shall organize the most systematic study and mastery of Marxism-Leninism throughout our Association, from top to bottom. Starting with the planned study and application of the main line of the draft resolution of our National Board, with the Duclos article, as well as with Comrade Foster's letter of Jan. 20, 1944, *we must encourage and develop the widest and most profound study of the Marxist-Leninist classics, especially the reports and writings of Comrade Dimitrov;* the History of the CPSU; Lenin's Imperialism and Left-Wing Communism, Marx, Engels—Marxism, The Renegade Kautsky, and the Collapse of II International; and not least of all The Foundations of Leninism and the Mastery of Bolshevism by Stalin." (Emphasis added.)

With the possible exception of but one petitioner, there is no evidence that any of them said or did anything during the period covered by the indictment and for many years prior thereto which could reasonably be interpreted as evidence of an understanding or belief that the principles of Marxism-Leninism taught or advocated the duty or necessity of overthrowing or destroying the Government of the United States by force and violence. As to most of them, there is no evidence that they *ever* said or did anything evidencing such an understanding or belief. As for the remaining petitioners, the acts or declarations attributed to them were so remote in point of time, almost all of them antedating the indictment by approximately fifteen years, that they were devoid of a vitality sufficient in law to support a conclusion that they understood or intended the reconstituted Party—which dedicated itself to the achievement, through the electoral process, of a people's front government, based on an anti-fascist coalition—to teach and advocate the forcible and violent overthrow of the Government.

To support its theory, the prosecution introduced evidence of practices on the part of the Communist Party which it claimed evidenced a purpose to engage in the proscribed teaching and advocacy. These included such things as the Party's policy of concentrating on recruiting members from among workers engaged in the larger industries; conducting its meetings in private and excluding non-members therefrom; conducting its schools in private and excluding non-members therefrom; making preparations for so-called underground existence in the event that its open existence and functioning should be made impossible; etc. None of these things was, however, sufficient, whether considered in isolation or collectively, to support the conclusion that these petitioners intended to teach and advocate the proscribed doctrine. For, as the trial judge

himself observed when the Government pressed the contention that going underground was evidence of an illegal purpose: "Well, does the fact that the Party decided to go underground mean anything more than they think they are unpopular" (Tr. 9971). And in respect to the so-called secrecy of the Party's activities, he observed: "It seems to me something more than the fact that people want to keep their activities secret is necessary to show that their activities are illegal, and certainly something more is necessary [than] that somebody engaged in secret activity to show that he knew what Budenz thought Marxism-Leninism was" (Tr. 9980).

It would seem clear, particularly in light of the constitutional questions raised in earlier portions of this Petition, that an important question concerning the constitutional sufficiency of the evidence herein is presented which ought to be reviewed by this Court.

IV

It was reversible error to admit Lautner's testimony that he had been subjected to physical violence and expulsion from the Communist Party, without hearing, by persons other than the petitioners.

The trial court, over the objection of the petitioners (A. App. 73), permitted Lautner to testify, in great detail, to the cruel and gruesome circumstances under which, he said, he had been coerced by threats and physical violence, perpetrated by persons other than the petitioners, to sign a confession, in January, 1950, that he was an "enemy agent"—a confession on the basis of which he was expelled from the Communist Party, without opportunity to be heard (A. App. 73-81). This testimony was admitted notwithstanding that none of the petitioners was present at or partici-

pated in the incident, and none was shown to have had any knowledge thereof or to have authorized or ratified it.

This same testimony was offered in eight other Smith Act prosecutions in which Lautner appeared as a witness. But in each of these cases the trial judge rejected it. The cases we refer to were the following: *United States* v. *Frankfeld*, 4 Cir., 198 F. 2d 679, cert. den., 344 U. S. 922; *United States* v. *Yates, et al.*, U. S. D. C., So. Dist. Cal., now pending in 9th Cir. Ct./App., No. 13,480; *United States* v. *Wellman, et al.*, U. S. D. C., East. Dist. Mich., now pending in 6th Cir. Ct./App., No. 12,237; *United States* v *Huff, et al.*, U. S. D. C., West. Dist. Wash., now pending in 9th Cir. Ct./App.; *United States* v. *Fujimoto, et al.*, U. S. D. C., Dist. of Hawaii, now pending in 9th Cir. Ct./App.; *United States* v. *Mesarosh, et al.*, U. S. D. C., West. Dist. Pa., appeal now pending in 3rd Cir. Ct./App.; *United States* v. *Forest, et al.*, U. S. D. C., East. Dist. Missouri, appeal now pending in 8th Cir. Ct./App.; and *United States* v. *Kuzma, et al.*, U. S. D. C., East. Dist. Pa., appeal now pending in 3rd Cir. Ct./App.

After the petitioners were convicted, the trial judge entertained such misgiving as to the admissibility of the testimony, that he granted them bail pending appeal on the ground that its admission presented a substantial question (A. App. 116).

There was no valid ground for the admission of this testimony against these petitioners. Not only was it utterly devoid of any rational tendency to prove any fact relevant to their guilt, but it was so inflammatory and prejudicial as to exclude the possibility of the jury's calm and dispassionate consideration of the evidence as a whole.

Although, as we have said, none of the petitioners was in any way connected therewith, Lautner was permitted to testify as follows: Early in January, 1950, at the request of Jack Kling, who was then National Treasurer of the Communist Party, he went to Cleveland, arriving there of

a Saturday morning (A. App. 73). Later that day he met Kling, and they drove to a house located in "the industrial part of Cleveland known as Kingsbury Run" (A. App. 73-74). As they entered the house, Kling suggested that they "go down in the cellar" (A. App. 73). Lautner described the cellar scene as follows (A. App. 74-75):

> "The cellar door was right at the end of the living room where a staircase was leading upstairs, and under the staircase was steps going down in the cellar. I walked ahead. I went down to the bottom of the staircase there. I saw two male persons, two men, playing cards at a table. Right beyond that table, about five feet away, there was a rope across the cellar and white sheets were drawn cutting off the other parts of that cellar. So when I came to the bottom of the cellar, there was only this table there and a few chairs. There was a woodpile under the staircase and there was a little box with kindling wood right alongside of the staircase there, and on the side of the wall where the staircase ends there was a washtub, a sink, and both spigots were running full blast. The water was running into that washtub. When I stepped down, these two men that were playing cards got up and one of them turned towards me and told me to undress."

About "four or five minutes" after Lautner entered the cellar (A. App. 76), Kling came down to the cellar accompanied by Joe Brand, who was Labor Secretary of the Communist Party of Ohio, and Solly Whelman, who was a member of the State Secretariat of the Communist Party of Michigan (A. App. 76). Lautner was then "stark naked" (A. App. 77). Kling and his associates "came down with two boxes and they set up a tape recording machine, and what they said was a lie detector, * * *. I was told to sit down at the table on one of the chairs, and I asked Jack Kling, 'Well, what's this?'. And he said,

'You will find out'. And he said some vile words there" (A. App. 77). He testified further as follows (A. App. 77-78):

"I asked Jack to allow me to put on some clothes because it was cold in the cellar. They were in overcoats. I was shivering.

"Joe Brand said, 'You don't need any clothes. You are not going anywhere.'

"I sat there naked on a chair, cement floor. I was told that I won't get away; we got you; you thought you were going to get away with it.

"I was accused of being an enemy agent in the ranks of the Party. I protested and I said that this is not true. They said, 'Well, who do you think you are fooling!'

"In the meantime the tape recording machine was rigged up and also this alleged lie detector. I don't know what it was. This is what they said it was. They put a tape on my wrist and a ball in my hand, and I was supposed to keep my hand on the table, and every time I said something, this chauffeur who drove the car—who was on the other side, on the instrument side of this thing—and every time I said something he called me a God damn liar, that I was lying.

"I told Jack that a terrible mistake is being done over here, and I was just laughed at. They were all laughing at me.

"I asked Jack again to allow me to put on some clothes. He didn't even listen to me. One man was behind my neck with a gun right against my head, pressing my head closer to the microphone of this tape recorder because they were testing it in the meantime and it didn't come through satisfactorily; the recording was not satisfactory.

"The other fellow had a rubber hose.

"By the way, there was some butcher knives on that little box where they threw my clothes. There were

two butcher knives over there and about three more rubber hoses over there, and this fellow with the rubber hose was hitting the side of the wooden wall that covered the staircase coming down."

Kling asked him when he was in contact with the Central Intelligence Agency, and asked him whether he had given oral or written reports to that Agency, and how often he had made such reports (A. App. 78). He was asked when and where he was in conversation with Noel and Herman Field (A. App. 78). He "denied all the questions that they threw at me, that it is not true," but "this fellow always said that I was a God-damn liar, that the machine says different" (A. App. 78). He asked again to be permitted to put on his clothes, but he was not allowed to put on anything; he was in bare feet and completely naked (A. App. 78). Brand shook a book in his face and said, "We know who you are, we know all about you, why deny it" (A. App. 78). At or about this point, Kling, Brand and Whelman went upstairs, returning about ten minutes later (A. App. 79). Upon their return to the cellar, Lautner testified the following occurred (A. App. 79):

"Q. Will you continue to tell us what happened after they returned. A. Jack Kling told me to keep my head down and not to look anywhere, not to look up. I kept my head down. When I raised my head, this person with the gun behind me always poked my head down with the gun.

"Q. Had you gotten dressed in the meanwhile? A. No, I was still naked. Joe Brand got behind me, and he was the only person who hit me. Jack Kling said, 'You will have to write a statement to the effect that you are being accused and that you had a fair and impartial hearing.'

"Q. Did you write such a statement? A. I wrote that statement with a pencil and paper they gave me,

that I had a fair and impartial hearing and I was accused of being an enemy agent. Joe Brand says, 'Well, let us have it in ink' after I had finished that statement. I wrote the other statement in ink, the same statement. So I made two statements, one in a pencil writing and one in an ink writing."

After Lautner had written out the statement requested of him his clothes were returned to him and he got dressed (A. App. 80). Some of the money which he had had in his clothes and a pair of gloves were not returned to him (A. App. 80). He was then taken upstairs and put into a car (A. App. 80). He remembered going over a wooden bridge and then another bridge and "they threw me out of the car near a factory site near Scoville Avenue. They told me to walk down the street on the other side and there is a bus stop and take the bus there and that will take me back downtown" (A. App. 80-81). On the Tuesday next following, i.e., January 17, 1950, Lautner said he read an item in the *Daily Worker* to the effect that he had been expelled from the Communist Party (A. App. 81). He said that he attempted to appeal his expulsion; he sent a letter to petitioner Trachtenberg who was then Chairman of the Review Commission, but received no response thereto (A. App. 81).

The Court below said of the foregoing as follows:

"We have no doubt as to the relevancy of the testimony. Lautner's expulsion tended to prove two theses advanced by the prosecution in support of its contention that an objective of the Communist Party was the forcible overthrow of the Government: *first*, that the Party functioned not as an ordinary political party but in a covert, deceptive, violent, and highly disciplined manner, such as might be expected of a revolutionary organization; and *second*, that although the provisions of the Party Constitution seemed to belie a revolutionary purpose, the Constitution was not in practice faithfully observed—the Government's so-called 'Aesopian' theory."

In so holding, the Court erred. It is a commonplace that even in the ordinary conspiracy case, the acts and declarations of co-conspirators are admissible against an accused only if they are done and made in the course of the conspiracy and in furtherance of its objects (*Krulewitch* v. *United States, supra,* 336 U. S. 440, 443). In the case at bar it was charged that the object of the alleged conspiracy was to teach and advocate the duty and necessity of overthrowing and destroying the Government of the United States by force and violence. Hence, Lautner's testimony would be admissible only if it showed that the acts and declarations to which he testified were designed to further that object. But it did not show that. What it showed was, that if he was dealt with as he said he was, it was only because he was believed to be a Government spy and informer in the ranks of the Party. Whether it was proper to deal with him in that way, is beside the point. For the elimination from the ranks of an organization of one who is thought to be a Government spy therein, no matter how it is accomplished, has no rational tendency to prove that the organization is engaged in unlawful activities. To say otherwise, is to give an organization a Hobson's choice of either harboring spies or running the risk, if it expels them, of incurring the inference that it was engaged in illegal activities. The presence of a spy, particularly in a minority political party, must inevitably strike dread and terror in the hearts of its members, no matter how lawful and proper their objects and activities may be. For, as was said in a *Report Upon the Illegal Practices of the United States Department of Justice,* covering the use of informers during the period 1917-1921, which was signed by twelve eminent members of the bar, including Felix Frankfurter, now Associate Justice of the United States Supreme Court, Zechariah Chafee, Jr., Professor of Law at Harvard University, Roscoe Pound, then Dean of the Harvard Law School (p. 5):

"We do not question the right of the Department of Justice to use its agents in the Bureau of Investigation to ascertain when the law is being violated. But the American people has never tolerated the use of under-cover provocative agents or 'agents provocateurs', such as have been familiar in old Russia or Spain! *Such agents have been introduced by the Department of Justice into the radical movements, have reached positions of influence therein, have occupied themselves with informing upon or instigating acts which might be declared criminal* • • •." (Emphasis added.)

That the sole motivation for Lautner's expulsion was the belief that he was a Government spy is made clear by Lautner himself. Witness the following from his testimony:

"I was accused of being an enemy agent in the ranks of the Party. I protested and I said this is not true. They said, 'Well, who do you think you are fooling?' " (A. App. 77)

"Joe Brand was shaking this book into my face and said, 'We know who you are, we know all about you, why deny it.' He said, 'You had better come clean and tell us all your contacts and all your connections with all these agencies'." (A. App. 78)

"Jack Kling said, 'You will have to write a statement to the effect that you are being accused and that you had a fair and impartial hearing.' • • • I wrote that statement with a pencil and paper they gave me, that I had a fair and impartial hearing and that I was accused of being an enemy agent." (A. App. 79-80)

One of the theories on which the Court below sustained the admissibility of Lautner's testimony was that the Party Constitution required that he be afforded an op-

portunity to be heard before he was expelled; and that since he had not been given that opportunity this tended to show that all provisions in the Constitution were "Aesopian", including those which declared that, "The Communist Party upholds the achievements of American democracy and defends the United States Constitution and its Bill of Rights (GE 18, p. 3; GE 66, p. 3), and that, "Adherence to or participation in the activities of any clique, group, circle, faction or party which conspires or acts to subvert, undermine, weaken or overthrow any or all institutions of American democracy, whereby the majority of the American people can maintain their right to determine their destinies in any degree, shall be punished by immediate expulsion" (GE 18, Art. IX, sec. 2; cf. GE 66, Art. VIII, sec. 3). We respectfully submit that it is a wholly unwarranted leap, both in law and logic, to say that because an organization has expelled a member who is believed to be a spy, without giving him the hearing provided for in its constitution, it is reasonable to infer that it regarded *all* of its constitutional provisions as mere window dressing and intended to bring about the violent overthrow of the Government.

Moreover, it would seem manifest that even if there were some ground on which evidence of the bare fact of Lautner's expulsion without hearing would be admissible, the same cannot, in any event, be said for his testimony concerning the events in Cleveland. For that testimony, obviously, had no rational tendency to prove any fact in issue relevant to the guilt of the petitioners. Its only effect could be to inflame the jury and prevent a fair and impartial verdict. *United States* v. *Krulewitch*, 2 Cir., 145 F. 2d 76, is a case in point. Although that case involved a panderer, it is not inappropriate to cite it here, for, the instant case, involving as it does the constitutional freedoms guaranteed by the First Amendment, calls even more imperatively for the application of the evidentiary principles

there enunciated. Krulewitch was convicted for transporting a woman, named Joyce, in interstate commerce for purposes of prostitution. One of the two grounds on which the Court reversed his conviction was that one Mary Smith had been permitted to testify that a short time after Krulewitch had engaged her as a domestic servant he had raped her. In holding that the admission of that testimony constituted reversible error, Judge LEARNED HAND, writing for the Court, said (145 F. 2d at 80):

> "The other question is of the admission of a part of the testimony of one, Mary Smith—also a prostitute—who swore that the accused had lived off her earnings while she was so engaged. So far, her testimony was competent upon the issue of his purpose in taking Joyce to Florida, for it fell within the well-established doctrine that other instances of similar conduct are competent to prove intent (or purpose) upon the occasion for which the accused is on trial. Neff v. United States, 8 Cir., 105 F. 2d 688. Cohen v. United States, 5 Cir., 120 F. 2d 139. Had she said no more, no doubt would be raised. But she was asked to tell her relations with the accused from the outset, and she said that he had first employed her as a domestic servant in his apartment, and that a short time after she came to live there he had one night raped her. It was after this prelude, she said, that he had persuaded her to become a prostitute for his profit. Had the indictment been for transporting Joyce to enjoy her favors, this evidence would have been clearly competent under the rule we have mentioned. But it was not and rationally it does not in the least tend to prove that a man is living from the earnings of a harlot that he has raped another woman. Nor does it even add to the probability that the raped woman also became a harlot and that the man lived off her earnings."

So may it be said with equal validity here that "rationally it does not in the least tend to prove" that men intended the violent overthrow of the Government, that they perpetrated an assault on one whom they regarded as an enemy in their ranks.

But even if the testimony concerning the Cleveland incident had been rationally relevant to the conclusion which the Government sought to prove through it, it would still have been inadmissible under the principle stated as follows in the *Krulewitch* case (145 F. 2d at 80):

> "• • • [T]he competence of evidence in the end depends upon whether it is likely, all things considered, to advance the search for the truth; and that does not inevitably follow from the fact that is rationally relevant. As has been said over and over again, the question is always whether what it will contribute rationally to a solution is more than matched by its possibilities of confusion and surprise, by the length of time and the expense it will involve, and by the chance that it will divert the jury from the fact which should control their verdict. Wigmore §§ 39(2), 42."

For it is surely as valid to say of the Cleveland testimony what Judge HAND said of Mary Smith's testimony in the *Krulewitch* case at p. 80:

> "That part of Mary Smith's testimony which we are considering did not, as we have said, even tend to prove the accused's purpose in transporting Joyce; but if it had, it was much more likely to divert, than to enlighten, the jury. For, even though there can be squeezed from it some drop of confirmation of her story that she 'worked' for him, it was at a cost more than commensurate with the dangers it involved, it greatly tended to muddle the jury, and to lead them to convict the accused because he was in general so loathsome."

How devastating an impact this testimony must have made on the jury is, we think, all too apparent, particularly when account is taken of the climate of hostile public opinion in which these petitioners went to trial. The testimony concerning the Cleveland incident was the only item of evidence in the case which tended to show the commission of an illegal *act*—true, not an act committed by any of these petitioners, but one which the Court instructed the jury they could consider as an act of the petitioners, at least for the purpose of inferring their intent. As such, the incident stood out as one of towering importance—of such importance, that Government counsel knew he had but to *mention* it in his summation to the jury, to conjure it in all its intended horror before their eyes. For one can almost see the knowing glance and hear the accusatory inflection of the prosecutor as he referred to the incident in these words: *"You will recall, without my going into the evidence, the type of hearing received by the witness Lautner"* (Tr. 15281; emphasis added).

V

The methods of jury selection violated constitutional and statutory requirements.

The Composition of the Jury List

Petitioners' challenge to the array rests upon the grounds that (1) the jury lists, panels and array from which the petit jury was drawn were intentionally and systematically limited to mere token representation of Negroes, Puerto Ricans and manual workers; (2) the responsible jury officials failed to carry out the statutory and constitutional mandate to employ such methods and procedures as would ensure a representation of a cross-section of the community; and (3) the basic jury list was so weighted with and loaded by the numerically small but economically dominant

groups in the community as to preclude a fair and impartial trial in this case in view of the special interest which such groups have in silencing the defendants in a Smith Act prosecution.

The basic jury list from which was drawn the panel of prospective jurors available for this case contained 14,000 persons. Of this number, manual workers, who constitute over 50% of the employed males in the Southern District of New York qualified to serve, comprise but 7% of the employed males on the jury list (Doc. No. 189, pp. 4, 10, Vol. VI).* On the other hand, managers, officials and proprietors, who represent only 15% of the employed males in the Southern District, comprise 44% of the employed males on the jury list. Together with the closely related groups of professional and sales persons, they comprise *four-fifths* of all the employed males on the jury list, although the combined groups represent only one-third of all the employed males in the area (ibid., p. 10).

Negroes constitute 13% of the population of the Southern District. Over 500,000 live in the three main counties of the Southern District, Westchester, Bronx and New York; 400,000 live in New York County, slightly less than 100,000 in the Bronx, and 40,000 in Westchester. They comprise 20%, 7% and 6% of the population of those counties respectively (Vol. VI, Doc. No. 189, p. 22). Puerto Ricans live in Manhattan and the Bronx in large numbers and comprise a substantial part of the population.

Yet Negro and Puerto Rican representation on the jury list is merely token. There is almost a total absence of

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* The petitioners analyzed the composition of each and every panel drawn for the six months period preceding the challenge. These panels, thirteen in number, referred to as the "current panels," contain 3,275 names. The current panels were considered by both the trial judge and the court below as a fair sample of the entire jury list. Hereafter when reference is made to the composition of the basic list, unless otherwise indicated support for such reference is the analysis of the current panels.

Workers designated by the petitioners as manual workers comprise craftsmen, operators, service workers and laborers classified in accordance with the Census Bureau classifications (Vol. VI, Doc. No. 189, pp. 7, 8).

Spanish surnames and a virtual complete absence of jurors from areas known to be inhabited by a substantial Negro population (Vol. VI, Doc. No. 189, p. 22).

Of the veniremen on the jury list who reside in Manhattan, 74.7% come from five favored assembly districts in which only 40.7% of the voting population of Manhattan resides. These districts, the 1st, 5th, 8th, 9th and 15th Assembly Districts, are almost completely without Negro and Puerto Rican population, and contain a large proportion of wealthy and upper middle class inhabitants. By contrast only 5.8% of the Manhattan veniremen come from seven other assembly districts, the 2nd, 4th, 11th, 12th, 13th, 14th and 16th, in which 32% of the Manhattan voting population resides. The overwhelming majority of Negroes, Puerto Ricans and manual workers are concentrated in these districts. The 9th Assembly District, known as the "silk-stocking district" (A. App. 16), has 21% of the veniremen, although only 7% of the voters reside within its boundary. This district alone has 61 times as many jurors as the 14th Assembly District whose population is overwhelmingly Negro (A. App. 16), and 3½ times as many jurors as the combined total of the aforementioned seven districts. Each one of the five favored districts, alone, has from two to three times as many veniremen as all seven of the excluded districts combined (Vol. VI, Doc. No. 189, p. 25). A similar pattern of distribution appears in the Bronx (ibid., pp. 32-36).

Moreover, even within the Assembly Districts in which the Negro people were known to reside, the few veniremen selected were selected almost exclusively from among the white voters. For most of the veniremen in these districts come either from housing projects or developments in which Negro and Puerto Rican people do not reside, or from areas within such districts in which no Negroes or Puerto Ricans reside (Vol. VI, Doc. No. 189, p. 30).

The exclusion of the Negro people is dramatically illustrated by a comparison of the representation accorded seg-

regated housing developments in which only white persons reside, with that accorded developments containing either a mixed population or an exclusively Negro population. Thus in the 3rd Assembly District in Manhattan, which contains 144 veniremen, 44 come from London Terrace, a high rent private apartment development where Negroes do not reside, which occupies but one of the approximately 250 city blocks in the District. By contrast, two public housing projects within the same Assembly District, Amsterdam Houses and J. Elliott Houses, whose occupants consist of both Negro and white voters, are not represented by a single venireman although their number far exceeds the number of London Terrace occupants (Vol. VI. Doc. No. 189, pp. 26-27).

The same pattern appears in the Assembly Districts in the Bronx (ibid., pp. 35-36).

The Methods of Jury List Selection

The record shows that the basic jury list was composed of persons who were qualified for jury service in the period between 1938 and March, 1952. Three different methods of selection were employed during that time. The first, employed in the period between 1938 and 1943, consisted of the selection of prospective jurors from among names furnished to the jury clerk by the Federal Grand Jurors Association, a private organization. The record discloses the following concerning this period.

In 1938 the array in the Southern District of New York underwent a "reorganization" designed to obtain a basic list of "superior", "very high type" citizens of "better", "more selective" and "uniformly high quality" to serve regularly as the jurors in the court. Concomitantly, the plan required the removal of "inferior" jurors, i.e., "relief workers and housewives" who were then "overcrowding" the juries. Until July, 1942, these substitutions were effected and the jury list was replenished, almost exclu-

sively, with names which were supplied by the Federal Grand Jurors Association (Vol. VI, Exh. 2 to Doc. No. 181, incorporated by reference in Doc. No. 189). The Federal Grand Jurors Association obtained the names which it submitted to the jury officials from such sources as *Who's Who in New York*, the *Social Register*, *Poor's Directory of Directors*, the *Engineers Directory* and certain university alumni directories (Vol. VI, Doc. No. 189, pp. 5, 6, 7, 8). The jurors recommended by the Federal Grand Jurors Association were accepted by the office of the Jury Clerk without investigation of any kind. The names supplied by the Association were supplemented to a slight extent by the jury clerk with names which he himself selected from sources similar to those used by the Association (Vol. VI, Doc. No. 189, p. 6). More than one-fourth of the persons selected in this manner remained on the basic list at the time the jurors were drawn for this case (Vol. VI, Doc. No. 189, p. 7).

The second method of selection, employed between 1943 and January 1949, consisted of the selection of additional jurors from voting lists. But the jury officials, in using such lists, concentrated on those districts containing predominantly white middle and upper class residents, while they made no use of the voting lists of those districts in which the population consisted overwhelmingly of Negroes, Puerto Ricans, and manual workers (Vol. VI, Doc. No. 189, pp. 8-10).

The record shows that two-thirds of the persons appearing on the basic list at the time the jurors were drawn for this case, consisted of persons selected by the two methods above described (Vol. VI, Doc. No. 191, p. 2). Since the two methods of jury selection in this period, i.e., from 1938 to the end of 1948, were the subject of a challenge in *United States* v. *Dennis*, 183 F. 2d 201, said period will hereinafter be referred to as the "*Dennis* period."

The third method was employed in the period between November 1949 and March 1952, the date of the challenge. In this period the jury officials sent a substantially equal number of qualification notices to each District in Manhattan and the Bronx.* Although they made a random selection of those to whom qualification notices were sent, they subsequently applied standards unauthorized by statute in determining eligibility for jury service. This resulted in eliminating the very same groups and classes which had previously been excluded from jury service during the *Dennis* period (Vol. VI, Doc. No. 199, tables VIII and IX).

The procedure which the jury clerks followed in this latter period, i.e., 1949 to March, 1952, was as follows: When a prospective juror appeared in response to the qualification notice, he was asked by a jury official whether he "knew of any reason why he should not serve on any jury" (A. App. 13-14). If he pleaded financial or physical hardship, he was excused by the clerk (A. App. 14). If he offered no such excuse, he was given a questionnaire which called for the following information: occupation, residence, education, property qualification and criminal record, if any (Challenge DE A). When the questionnaire was filled out, it was handed to the clerk or his assistant, who either accepted or rejected him as a juror. In some cases the reason for the rejection was noted on the questionnaire; in others it was not noted (A. App. 14-15). The reasons when noted included not only failure to meet statutory requirements such as age, residence, citizenship, literacy requirements, etc. (Tr. 438). They also included reasons *unauthorized by statute*, such as "appearance and manner", and failure to complete the questionnaire.

The record discloses that the overwhelming number of Negroes, Puerto Ricans and manual workers who responded

* This practice was not applied to Westchester County which received a substantially proportionate higher number of notices in relation to its voting population than did Manhattan and the Bronx.

to notices were eliminated by the jury clerk because of alleged financial hardship, appearance and manner, failure to complete the questionnaire, and for other reasons which were not specified at all.*

Importance of Questions Raised by the Challenge

The trial judge found that throughout the entire ten-year *Dennis* period there was no attempt to achieve a jury list representing a cross-section of those eligible for jury service (A. App. 28). Our recital of the facts shows that during that period, the design of the jury officials was to achieve a jury list which would reflect, not the Community, but the upper classes. By placing its imprimatur on a list which is tainted by these methods of selection to the extent of two-thirds of its present members, the Court below has sanctioned methods of jury selection which, if emulated elsewhere—as well they may be in view of the prestige of the Second Circuit—must strike a mortal blow at "our notions of what a proper jury is [which] have developed in harmony with basic concepts of a democratic society and a representative government" (*Glasser* v. *United States*, 315 U. S. 60, 85). For "it is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community" (*Smith* v. *Texas*, 311 U. S. 128, 130).

* An analysis of the period between April 1, 1951, and March 31, 1952, discloses that more than half of the manual workers who responded to notices were excused by the jury clerk and his assistants for financial hardship (Challenge GE 1, Table 5; Vol. VI, Doc. No. 199, p. 18; ibid., table VIII). Of the remaining 900 manual workers who received questionnaires in the one-year period under analysis, 234 were rejected for reasons noted on the questionnaire which were related to statutory standards of eligiblity. Of the 666 manual workers who remained, 85% were rejected for "appearance and manner" failure to complete questionnaires and by standards for which no reasons were given. Whereas, in contrast, of the 1,899 non-manual workers who survived elimination for statutory grounds only 35% were rejected by standards of appearance and manner, incomplete questionnaire or where none was specified (Vol. VI, Doc. No. 199, Table 1). A similar discriminatory result of the application of these standards is revealed with respect to Negroes and Puerto Ricans (Vol. VI, Doc. No. 199, Table III).

How the Court Below Dealt with the Challenge

The Dennis Period

With respect to the *Dennis* period the record contains direct proof of the discriminatory design and its effectuation.

The methods of jury selection in this period violated the constitutional and statutory command that jurors be drawn from a cross-section of the community (*Ballard* v. *United States,* 329 U. S. 187; *Thiel* v. *Southern Pacific Railway Company,* 328 U. S. 217; *Glasser* v. *United States,* 315 U. S. 60).

Petitioners relied on *Glasser* v. *United States, supra,* in support of their contention that the jury clerks' almost exclusive reliance on the Federal Grand Jurors Association for the names of prospective jurors during 1938-1943 was illegal. The Court below held that *Glasser* "condemns only exclusive reliance upon sources recommended by a private association and that the decisive question is whether partial reliance so weights the array under attack as to require its dismissal" (A. App. 242). Finding that approximately 28% of the jury list at the time of the trial herein consisted of jurors selected during 1938-1943, the Court held this to be insufficient to taint the list.

We submit that when more than one out of every four jurors has been selected on the basis of the recommendation of a private organization, the list is so weighted as to require dismissal of the list. However, this was not the only respect in which the list was improperly weighted. For, as we have shown, an additional forty percent of the list was selected during the years 1943 to the end of 1948, by limiting the selection of jurors to those who resided in the favored districts. By this means the clerk accomplished the same results as those produced by the use of the Federal Grand Jurors Association's recommendations. Thus the

basic jury list is tainted not to the extent of one out of every four jurors on the list, but two out of every three jurors.

The Court below justified this latter practice on the theory that it was permissible for jury officials in their search for competent jurors to "recognize in advance that there were groups which were 'poor risks,' so long as these groups be not entirely excluded or limited to token representation" (A. App. 243). We know of no principle or authority, except the decision of the Court below in *Dennis*, 183 F. 2d 201, which sanctions what is tantamount to group condemnation by jury officials. Such a concept is at war with the holding in *Thiel* v. *Southern Pacific Railway*, 328 U. S. 217, 220 that (1) Jury competence is an individual rather than a group or class matter and (2) advance group condemnations are intolerable under our law (*Thiel, supra*, at 224). Cf. *Cassell* v. *Texas*, 339 U. S. 282; *Hill* v. *Texas*, 316 U. S. 400; and *Norris* v. *Alabama*, 294 U. S. 587.

The Post-Dennis Period

It would seem clear that when two-thirds of a jury list is tainted as the one at bar was, a challenge thereto would have to be sustained. Not only did the Court below hold that the methods by which these two-thirds were procured were inherently lawful, it also held that these methods could be justified on the ground that no other proper method of jury selection would yield a different result. It found confirmation for this thesis in the fact that the post-*Dennis* method of selection, which they regarded as a random method properly administered by the jury officials, yielded substantially the same results as those which flowed from the methods used in the *Dennis* period.

In this the Court erred. For while qualification notices were distributed at random, the methods used in determin-

ing the eligibility of those who responded to the notices were arbitrary and unlawful.

Petitioners complain: 1) that the jury clerks unlawfully exercised a power not entrusted to them by law when they presumed to excuse prospective jurors for financial hardship; 2) that the jury clerks arbitrarily and unlawfully rejected persons who were fully qualified for jury service on improper grounds, such as "appearance and manner", failure to answer the questionnaire in its entirety and for unspecified reasons. Each of these complaints will be considered in the order stated.

(1) The jury clerks eliminated at least fifty percent of the manual workers who appeared in response to qualification notices in the post-*Dennis* period on a claim of financial hardship. Petitioners urge that this was an unlawful exercise of power by the jury clerks. The power to excuse a prospective juror for financial hardship is one that is expressly confided to District Judges (28 U. S. C., sec. 1863). It is a judicial, not an administrative function.

In disposing of this contention by petitioners, the Court below held that "the practice under which these excuses [financial hardship] are handled by the clerks appears to be contemplated by 28 U. S. C. A. sec. 1864, requiring the clerks to fill the jury box with names of 'qualified persons' " (A. App. 245). It reasoned:

> "This language certainly implies that jury clerks have discretion to omit persons as not 'qualified' because of deafness or illness for example. And we see no reason why such discretion should not extend to instances where the financial hardship of jury service might cause a prospective juror to worry, or feel annoyed or resentful, and thus interfere with his effective service as a juror." (A. App. 245)

This Court has held that the discretion of jury clerks "must be guided by pertinent *statutory* provisions" (*Thiel* v. *Southern Pacific Railway Co., supra,* at 220-221). While there is statutory authority for a clerk to excuse persons because of deafness or illness (28 U. S. C. A. sec. 1861(3); New York Judiciary Law, sec. 502(4)), there is none for his excusing of persons for financial hardship. Nor is there anything in 28 U. S. C. A. sec. 1864 which suggests he has any such power. That section deals solely with the manner of drawing jurors for trial from among those already qualified, the qualifications of the jury commissioner, and his compensation.

(2) The record shows that of those who appeared in response to qualification notices, a certain number were either excused for financial hardship or rejected on grounds provided for by statute. As to those who survived this process, the situation was as follows: 85% of the manual workers were eliminated by the application of such standards as "appearance and manner", failure to complete questionnaires, and for reasons not specified. On the other hand, only 32% of the non-manual workers were eliminated by the same standards and practices. To put it another way, *the application of these vague and unspecified standards resulted in the acceptance of only 15 out of every 100 manual workers for jury service, while 66 out of every 100 non-manual workers were accepted* (Vol. VI, Doc. No. 199, Table I). Substantially the same pattern appears in connection with the exclusion of Negroes and Puerto Ricans (ibid., Table IV).

The petitioners offered to prove, and the undisputed statistical data which they submitted in support of the offer confirmed, that manual workers, Negroes and Puerto Ricans possess the statutory qualifications for jury service in the same proportion and to the same extent as non-manual workers and white people (Vol. VI, Doc. No. 189,

pp. 4-5; Vol. VI).* Moreover, the assistant to the jury clerk testified that Negroes and manual workers who appeared for the purpose of qualifying were as intelligent, well-informed and literate as were the white non-manual workers and that the failure to meet these standards was not the basis for disqualifying most of the Negroes and manual workers (A. App. 17). It follows that the difference between the two groups in rate of rejection is to be explained only on the basis of intentional discrimination.

In any event, the vague and unspecified standards which the jury clerk used in determining eligibility for jury service necessarily contained opportunity for discrimination, which, in view of the gross under-representation of manual workers, Negroes, and Puerto Ricans, cast upon the Government the burden of negating such discrimination (*Avery* v. *Georgia*, 345 U. S. 559, 562)—a burden which it did not discharge.

In answer to the foregoing, the Court below said (A. App. 247):

> "* * * [We] cannot say that the so-called 'non-statutory' grounds for elimination were either improper *qua* standards or discriminatorily applied. The standards of qualification fixed by statute include several requirements, such as 'fair character,' 'approved integrity,' 'sound judgment,' 'well informed,' 'intelligent,' which may be ascertained in part by the prospective juror's appearance and manner, by his ability to spell and to complete the questionnaire according to instructions. And in those instances in which no reason for rejection had been noted, the Jury Clerk, upon examination by defendants as to three such cases, pointed out that two contained misspellings and one showed that the person would probably be over age by

* The trial judge treated as "established everything that defendants offered to prove except where the subject matter was covered by the testimony of the Court Clerks," there he "substituted the proof for the offer" (A. App. 52).

> the time he was called to serve. Thus in these instances, even where not noted, the reason for rejection was apparent on the face of the questionnaire."

The assumption by the Court that there was a relationship between the standards applied by the jury clerks and those fixed by statute is not supported by the record. The jury clerk testified that neither he nor his assistant applied any literacy or intelligence tests (Tr. 297), but that they relied on the "strength of the questionnaire" (Tr. 355). Moreover, the trial judge found that the criteria "appearance" and "manner" were not related to proper standards of eligibility (A. App. 49). The factor of "misspelling" was established as the "apparent" basis for the rejection of only three applicants out of a total of 582 persons who were rejected with no reason stated (Vol. VI, Doc. No. 199, Table 1A). Even assuming, *arguendo*, that there is a relationship between ability to spell and the statutory standards of eligibility, the record was silent as to the basis for the rejection of the remainder of the persons rejected in this manner.

Under the circumstances of this case, the burden was cast upon the Government to establish that the exclusions were caused by the operation of *bona fide* statutory standards of eligibility. *Avery* v. *Georgia*, 345 U. S. 559, 562; *Cassell* v. *Texas*, 339 U. S. 282, 288-289; *Hill* v. *Texas*, 316 U. S. 400, 404-405; *Pierre* v. *Louisiana*, 306 U. S. 354, 360; *Norris* v. *Alabama*, 294 U. S. 587, 598-599; *Neal* v. *Delaware*, 103 U. S. 370. This burden the Government did not meet.*

For all of the foregoing reasons petitioners respectfully submit that the question of whether the jury list of the Southern District of New York was the product of unlawful methods of selection should be decided by this Court.

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* The reliance by the trial court and the Court below on the blanket denial by the jury clerk of any conscious discrimination against the excluded groups was unwarranted (A. App. 247). This Court has consistently refused to accept such blanket denials in the face of evidence such as was presented in the instant case (*Cassell* v. *Texas, supra; Smith* v. *Texas*, 311 U. S. 128; *Pierre* v. *Louisiana, supra; Norris* v. *Alabama, supra*).

The jury officials violated their affirmative duty to employ such methods as would insure a representation of a cross section of the community.

The petitioners here raise a question not heretofore passed on by the Court, namely: whether those who are charged with the duty of selecting juries are required by the Constitution and the applicable statutes to make an active and affirmative effort to obtain juries which actually reflect a cross section of the eligible population, or whether they may justify a jury list, no matter how disproportionately the various eligible groups in the community are represented on it, solely on the ground that they have not been guilty of an intent to discriminate.

The requirement that a showing of an intention or design to exclude or limit the representation of any class in the jury system is necessary to sustain a challenge, is one that applies only to state juries which reach the federal courts under the Fourteenth Amendment. In such cases, the power of federal courts arises out of the federal question raised by a claim of violation of the due process and equal protection clauses of that Amendment. The act which violates the Fourtenth Amendment is purposeful and intentional discrimination against the group or class which is excluded from or granted only limited representation on the jury list (*Fay* v. *New York,* 332 U. S. 261 at 285). Therefore, in order to give rise to the constitutional grievance in cases involving state juries, the exclusion must be "rooted in design and not derived merely from error or fallible judgment" (*Snowden* v. *Hughes,* 321 U. S. 1; see also *Cassell* v. *Texas, supra,* at 290-291).

But the power of the federal courts over federal juries involves a far greater exercise of control than that which exists in its power over state juries (*Fay* v. *New York, supra,* 287; *Thiel* v. *Southern Pacific Co., supra,* at 225; *McNabb* v. *United States,* 318 U. S. 332, 340). It involves a "power of supervision over the administration of justice

in the federal courts" (*Ballard* v. *United States*, 329 U. S. 187, 192). Moreover, the principles which govern the process of selection of federal juries derives from congressional enactments which reflect a design to make the jury "a cross section of the community and truly representative of it" (*Ballard* v. *United States, supra*, at 191), and from principles of the Constitution embodied in the Sixth and not the Fourteenth Amendment (*Glasser* v. *United States, supra*, at 85).

The constitutional and statutory design is to achieve representation from a cross section of the community. Where there has been a failure to make any effort to achieve this result, the design is frustrated. In such a case it becomes unnecessary to establish a discriminatory intent in order to invalidate the list.

The rule in so far as it relates to the federal jury was stated in *Glasser, supra*, at 86, as follows:

> "But they [i.e., jury officials] must not allow the desire for competent jurors to lead them into selections which do not comport with *the concept of the jury as a cross-section of the community. Tendencies, no matter how slight, toward the selection of jurors by any method other than a process which will insure a trial by a representative group* are undermining processes weakening the institution of jury trial, and should be sturdily resisted." (Emphasis added.)

As the Court pointed out in *Glasser, supra*, at 86, and in *Thiel, supra*, at 224, the motives influencing such tendencies are immaterial.

That no effort was made to achieve a cross section of the community in the *Dennis* period is not in dispute. For the trial judge so found. This finding by the trial judge alone requires that the last be invalidated. But in addition when methods of jury selection have persistently

and over a long period of years produced *substantial disproportions* then it must be held that the methods employed fall short of the cross section requirements.

The jury list and the panel from which the trial jury in this case was drawn deprived petitioners of a fair and impartial trial in violation of the Fifth and Sixth Amendments of the United States Constitution.

Finally, petitioners urge that the jury list and panel from which the trial jury in this case was drawn deprived petitioners of a fair and impartial trial in violation of the Fifth and Sixth Amendments to the United States Constitution. "The defendants' right is to a neutral jury" (*Fay* v. *New York,* 332 U. S. 261, 289). A jury list composed of partisans on the very issues raised in the proceedings cannot produce a neutral jury and violates the constitutional safeguards of due process and a fair and impartial trial.

The Court said in *Fay, supra,* at 288-289:

> "Undoubtedly a system of exclusion could be so manipulated as to call a jury before which the defendant would have so little chance of decision on the evidence that it would constitute a denial of due process."

Such was the case here. The political theory, policies and program of the appellants which were an essential part of the evidence in this case, were contrary to the interests of the class which dominated the jury list.

VI

The petitioners were brought to trial in an atmosphere of prejudice against them created by agencies of the United States Government and calculated to produce a guilty verdict in violation of their constitutional right to a fair trial.

The petitioners moved prior to the trial for a continuance on the ground that not only the community from which the trial jurors were to be drawn, but the nation as a whole, was so pervaded with either a prejudgment of the guilt of the petitioners or a fear that disagreement with such prejudgment would result in social and economic reprisals, that a fair and impartial trial was all but impossible (Vol. VI, Doc. Nos. 179, 180, 202). The voluminous evidence submitted in support of the motion established the existence of such prejudgment and fear. It further demonstrated that they had resulted from an intensive, persistent public campaign conducted by agencies and officers of the Government of the United States, including the Attorney General and various officials and employees of the Department of Justice (ibid.).

During the course of the trial, and at its conclusion, petitioners moved for mistrial on the ground that Government agencies were continuing to carry on an *ex parte* assault against the petitioners outside the courtroom *while the trial was in progress,* in violation of their constitutional and legal rights to a fair trial (Vol. VIII, Doc. Nos. 237, 277; Vol. IX, Doc. No. 283).

Among the many acts of which petitioners complained was the following: On June 25, 1952, while the trial was in progress, the Senate Subcommittee on Internal Security, in collaboration with the F.B.I. issued a pamphlet entitled *Documentary Proof that the Communist Party, U. S. A.*

Teaches and Advocates the Overthrow and Destruction of the United States Government by Force and Violence (Vol. VIII, Doc. No. 237, Ex. A). The pamphlet was released to the press, together wtih a statement by Senator McCarran, Chairman of the Senate Subcommittee on Internal Security. The release of this pamphlet was given widespread front page publicity in the press in the Southern District of New York. Typical of this publicity were the following headlines:

"FBI Says Overthrow by Violence is Stalin Policy for Red Rule Here" (*New York Times,* July 30, 1952);

"Red Documents Cited by FBI as Plot Proof" (*New York Herald Tribune;* Vol. VIII, Doc. No. 237, Ex. C);

"FBI Documents Red Violence Aims" (*New York Daily News;* ibid., Ex. E);

"Secret FBI Report: Red Plan to Rule U. S. Revealed" (*New York Journal American;* ibid., Ex. G).

As proof of its thesis, the pamphlet referred to many writings received in evidence in this case (Vol. VIII, Doc. No. 237, Ex. A; GE 41; GE 4; GE 46; GE 7; GE 57; GE 9), thus expressing the Government's judgment on the meaning of writings, which was a major issue in the case. In addition, it referred to an article by petitioner Weinstone, which was received in evidence in this case (GE 68), and described him as a former teacher in the Lenin School in Moscow, although no evidence thereof was introduced at the trial (Vol. VIII, Doc. No. 237, p. 4). It also made specific reference to petitioner Bittelman, identifying him as being "presently under indictment in New York, charged with a violation of the Smith Act of 1940" (ibid., p. 4).

The pamphlet had no legislative purpose. Its obvious purpose was to create public opinion. The foreword by

Senator McCarran frankly states that the booklet was published because the "awareness" that the Communist Party "had as its avowed object the violent overthrow and destruction of the constitutional government of the United States" "was not common knowledge" (Vol. VIII, Doc. No. 237, Ex. A, p. 3). He concluded:

> "This booklet is the result. I hope it will enable many Americans to recognize, once and for all, the unilateral evil and illegal aims of our enemy, international communism, of which the Communist Party, USA, is one tentacle."

In addition, in his statement to the press, Senator McCarran stated that the "report" had been issued because "there have been some persons who tried to tell us the Communists were not dangerous."*

The Court below justified its affirmance of the denial of the motions for continuance on the grounds that the hostility to members of the Communist Party was so pervasive that "there was no reason to suppose that it would subside by any delay which would not put off the trial indefinitely" (A. App. 218-219). The "choice", it reasoned, "was between using the best means available to secure an impartial trial or letting the prosecution lapse" (A. App. 218). Assuming that this was the sole choice confronting the Court, can it be said that the constitutional safeguards of a fair and impartial trial and of due process may be scrapped when the government itself contributes substantially to the circumstances which make such a trial impossible? We submit not. The Constitution does not envisage a substitute of expediency for due process. There can be no criminal justice if there can be no fair trial. If a fair trial cannot be had, then it must wait. The social necessity for prosecuting

* We do not here detail the remainder of the prejudicial acts of Government which occurred during the course of the trial. Those are fully set forth in Vol. VIII, Doc. No. 277 and Vol. IX, Doc. No. 283.

crime must bow to the greater necessity for justice. *Trial of Aaron Burr*, 430, 469.

But even assuming, *arguendo*, that the choice adopted by the Court below is consistent with the constitutional guarantees of due process and a fair and impartial trial, the "best means available to secure an impartial trial" were not given the petitioners. For they were deprived of what little opportunity for a fair and impartial trial remained, by the continuing activity of Government officials and agencies during the course of the trial, which we have referred to above. In this respect, the situation in the case at bar was an even more aggravated instance of government interference with the right of an accused to a fair and impartial trial, than was that in *Delaney* v. *United States*, 1 Cir., 199 F. 2d 102. The convictions of the petitioners "accompanied by such events do not meet any civilized conception of due process of law" (*Shephard* v. *Florida*, 341 U. S. 50, 53).

VII

Misconduct of the trial jurors deprived petitioners of a fair and impartial trial.

After the evidence was in, but prior to the conclusion of the trial, a letter was received by the trial judge from Mrs. Van Dernoot, an acquaintance of Juror No. 12, Mrs. Sybil Kane, in which she stated, among other things, that Mrs. Kane had said at a private gathering that all Marxists want to overthrow the Government by force and that other jurors concurred in this view (A. App. 117). Accordingly, on December 17, 1952, the trial court conducted an interrogation of the jurors.

The interrogation of the jurors disclosed the following:

(a) Juror No. 3, Mr. Walter D. Lee, testified that Mrs. Kane had expressed to the other jurors views on the case

indicating that "she was flopping now to one side and the next day to the other" (A. App. 117).

(b) Mr. Landis, Juror No. 5, testified that Mrs. Kane had informed him on three separate occasions in the course of the trial, one of which occurred prior to the defense case, that she had made up her mind about the case (A. App. 118), and that "there were other members of the jury that had made up their minds" (A. App. 119, 124).*

(c) Mr. Hallett, Juror No. 6, testified that he heard Mrs. Kane make a statement that could be interpreted to mean that she had made up her mind (A. App. 120), and that she had commented on the importance of various items of evidence (A. App. 121).

(d) Miss Miller, alternate Juror No. 1,** testified that some of the jurors said in words or substance that Marxists in their time wanted to overthrow the Government (A. App. 122).

(e) Mr. Syracuse, alternate Juror No. 4, testified that he believed that all Marxists wanted to overthrow the Government by force (A. App. 123).

At the conclusion of the interrogation, the trial court excused Mrs. Kane, but denied petitioners' motion for a mistrial based on the misconduct of the jury (A. App. 125, 126). The following morning, December 18, 1952, Mrs. Kane telephoned Mrs. Mary M. Kaufman, one of the attorneys for the petitioners. The substance of Mrs. Kane's remarks to Mrs. Kaufman are set forth in an affidavit by Mrs. Kaufman (Vol. VII, Doc. No. 268), which reads in part as follows:

"She [Mrs. Kane] said that with the exception of one or two of the 'nicer jurors', all of the jurors have dis-

* The direction in which Mrs. Kane had made up her mind was indicated by the following from the testimony of Mr. Landis: "I said if she had made up her mind the only thing she could do in *fairness to the defendants* in the case, she should come up to you and tell you" (A. App. 120).

** Miss Miller replaced Mrs. Kane as Juror No. 12.

cussed the issues involved in the case and have expressed opinions and judgment thereon. She stated that at least four of the jurors have held and expressed a judgment on the case adverse to the defendants 'right along'; that they have expressed their views and judgment 'strongly' to the other members of the jury continuously; that others were less outspoken about their judgment of the issues, but also expressed similar judgments adverse to the defendants.

"I asked Mrs. Kane if she would state the names of the four jurors who had expressed strong views adverse to the defendants, and she stated to me that she would not inform me as to the names of those jurors but would inform the Court who those four jurors are."

On the basis of the foregoing statements of Mrs. Kane, petitioners moved for a further investigation of the conduct of the jurors. The trial court denied the motion. Thereupon the petitioners subpoenaed Mrs. Kane, who appeared in court on December 19, 1952. Petitioners advised the trial judge of her presence and requested opportunity to call her as a witness to prove the allegations contained in Mrs. Kaufman's affidavit (A. App. 127). The judge declined to hear her. Petitioners moved for reconsideration of their motion for a further investigation into the conduct of the jurors. They also moved for a mistrial on the ground that the conduct of the jurors resulted in presumptive prejudice, and on the further ground that the jurors had prejudged the issues in the case (A. App. 127-128). The trial judge denied these motions (A. App. 127-128).

That some of the jurors engaged in premature discussion of the issues is plain from their testimony. These discussions, standing alone, constituted such misconduct as to require a new trial (*People* v. *Moltke*, 118 Cal. App. 568; *Martin* v. *Oregon Stages*, 129 Ore. 435, 453-454). The statements of Mrs. Kane and the others "raised the presumption that the rights of the appellants were prejudiced" (*Stone* v. *United States*, 6 Cir., 113 F. 2d 70, 77-78; *Mattox* v. *United States*, 146 U. S. 140, 151).

In view of the record in this case, and the context in which it was tried, the denial of the motion for mistrial constituted an abuse of discretion (*Ewer's* v. *National Importing Co.*, C. C. W. Va., 63 Fed. 562; *Pool* v. *Chicago*, C. C. Ia., 6 Fed. 844; *Winebrenner* v. *United States*, 8 Cir., 147 F. 2d 322).

The refusal of the trial judge to hear the testimony of Mrs. Kane constituted a refusal to exercise his discretion at all. "Where competent evidence is offered it is the duty of the trial court to hear and consider it * * *." *Chambers* v. *United States*, C. C. A. 8, 237 Fed. 513, 521; *United States* v. *Sorcey*, C. C. A. 7, 151 F. 2d 899, 903; *Wheaton* v. *United States*, C. C. A. 8, 133 F. 2d 522, 527; *Stone* v. *United States*, C. C. A. 6, 113 F. 2d 70; *Little* v. *United States*, C. C. A. 10, 73 F. 2d 861, 865; *Mattox* v. *United States*, 146 U. S. 140; *Holmgren* v. *United States*, 217 U. S. 509, 521-522.

The climate in which these petitioners were tried made anything approximating a fair trial all but impossible. In these circumstances it behooved the trial judge to make certain that nothing within the precincts of the court itself should add to the already existing obstacles to a fair trial. Mrs. Kane's disclosures were of such a nature—they so strongly indicated not only premature discussion of the issues by the jurors, but their premature *judgment* as well— that even minimal requirements of due process demanded that the judge hear her testimony and exercise his discretion on petitioners' motion for a mistrial only after hearing that testimony.

CONCLUSION

The writ of certiorari should be issued and the judgment below reversed.

Respectfully submitted,

HARRY SACHER,
Attorney for Petitioners.

Of Counsel:
MARY M. KAUFMAN.

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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 442

ELIZABETH GURLEY FLYNN, PETTIS PERRY, CLAUDIA JONES, ALEXANDER BITTELMAN, ALEXANDER TRACHTENBERG, VICTOR JEREMY JEROME, ALBERT FRANCIS LANNON, LOUIS WEINSTOCK, ARNOLD SAMUEL JOHNSON, BETTY GANNETT, JACOB MINDEL, WILLIAM WOLF WEINSTONE AND GEORGE BLAKE CHARNEY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals has not yet been reported but is printed in petitioners' appendix record (A. App. 186). The trial judge's opinion overruling petitioners' pretrial motions is reported at 103 F. Supp. 925. His opinion overruling the challenge to the jury is re-

ported at 106 F. Supp. 966 and is printed in petitioners' appendix record (A. App. 27).[1]

JURISDICTION

The judgment of the Court of Appeals was entered on October 14, 1954 (A. App. 261). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the trial judge properly instructed the jury as to the evidence they could consider in determining whether petitioners intended to cause the violent overthrow of the Government.

2. Whether petitioners were entitled to a hearing on the issue of "clear and present danger."

3. Whether the requirement of "clear and present danger", as defined in *Dennis* v. *United States,* 341 U. S. 494, was satisfied in this case.

4. Whether the evidence was sufficient to sustain the verdict of the jury.

5. Whether Lautner's testimony as to the circumstances of his expulsion from the Communist Party was admissible evidence.

6. Whether the concurrent findings of the courts below with reference to the challenge to the jury system are clearly erroneous.

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[1] The record filed by petitioners includes the appendix to their brief as appellants in the Court of Appeals and is here referred to as "A. App." The reporter's typewritten transcript of the trial is referred to as "Tr."

7. Whether there existed such inflamed public opinion throughout the United States that the trial of petitioners should have been postponed indefinitely.

8. Whether a mistrial should have been declared because of the conduct of certain jurors.

STATUTES INVOLVED

The statutes involved are set forth in the petition, pp. 3–8.

STATEMENT

THE PROCEEDINGS BELOW

On June 20, 1951, petitioners were indicted (A. App. 4–11) in the United States District Court for the Southern District of New York for conspiring with each other and with the *Dennis*[1] conspirators "to commit offenses against the United States prohibited by Section 2 of the Smith Act * * * in violation of" Section 3 of the Smith Act until repealed by the 1948 revision and thereafter in violation of the general conspiracy statute, 18 U. S. C. 371, by (1) wilfully and knowingly advocating and teaching the violent overthrow and destruction of the Government; and (2) wilfully and knowingly organizing the Communist Party to so advocate.

As a part of the conspiracy, the indictment alleged in paragraphs 2–8 the following: (2) that petitioners and co-conspirators would par-

[1] *Dennis* v. *United States*, 341 U. S. 494.

ticipate in the organization of the Communist Party of the United States of America as a group of persons who engage in the proscribed advocacy; (3) that they would become members, officers and functionaries of the Communist Party; that they would assume leadership of the Party and responsibility for carrying out its policies and activities; (4) that they would cause clubs and other units of the Party to be organized, and would recruit and encourage recruitment of members of the Party, concentrating on recruiting persons in key industries and plants; (5) that they would conduct and cause to be conducted schools and classes for indoctrination in the principles of Marxism-Leninism in which would be taught the duty and necessity of overthrowing and destroying the Government of the United States by force and violence; (6) that they would publish and circulate and cause to be published and circulated books, articles, magazines and newspapers in which was taught and advocated the duty and necessity of overthrowing and destroying the Government of the United States by force and violence; (7) that they would write, and cause to be written, articles and directives in publications of the Communist Party including "Political Affairs," "Morning Freiheit," "Daily Worker," and "The Worker," in which was taught and advocated the duty and necessity of overthrowing and destroying the Government of the United States by force and

violence; (8) that they would agree upon and carry into effect detailed plans for the vital parts of the Communist Party to go underground, in the event of emergency, and from the underground position to continue the conspiracy charged.

The indictment then alleged overt acts in furtherance of the conspiracy.

The trial judge held that the indictment charged but a single conspiracy with two objects, and ruled out, as beyond the statute of limitations, consideration by the jury of the second object, that of organizing the Communist Party for the proscribed advocacy (A. App. 135–136). However, the evidence on the organizing aspect was considered in respect to the first object, that is, as to the conspiracy to engage in the proscribed advocacy and teaching (A. App. 150–153).

At the time of the trial, four defendants (William Norman Marron, Fred Fine, Sidney Stein, and James E. Jackson), were fugitives and had not been arrested.[3] Two defendants (Israel Amter and Marion Bachrach) were severed because of illness, and two (Isidore Begun and Simon Gerson) were acquitted by the trial judge at the end of the prosecution's case. The thirteen remain-

[3] Sidney Stein was apprehended on August 27, 1953, in the Sierra Mountains of California, together with Robert G. Thompson, another fugitive who was one of the defendants convicted in the *Dennis* case. *United States* v. *Thompson*, 214 F. 2d 545 (C. A. 2), certiorari denied October 14, 1954.

ing defendants were convicted and are the petitioners here.

After disposition of the pretrial motions, the case was called for trial on March 3, 1952. At that time, petitioners filed a challenge to the array of the petit jury panel. Commencing on March 31, 1952, hearings were held on this challenge and, after some three weeks, the trial judge overruled the challenge (A. App. 26). The jury selection was started on April 1, 1952 and was completed on April 23, 1952. On January 15, 1953, the case was submitted to the jury, which deliberated for 6 days. The verdict of guilty was returned on January 21, 1953, and sentence was imposed 13 days later. Petitioners' sentences ranged from imprisonment for a year and a day and $2,000 fine to three years and $6,000 fine (A. App. 173–185).

The judgments were affirmed by the Court of Appeals on October 14, 1954 (A. App. 186–250).

THE GOVERNMENT'S EVIDENCE

The evidence in support of the verdict of the jury demonstrated that the defendants in the *Dennis* case were co-conspirators of petitioners, that in fact these petitioners were members of the same conspiracy proved in that case. To demonstrate that these petitioners were sitting at the same table as the *Dennis* defendants, a summary of important Communist Party positions held by petitioners is set forth:

ELIZABETH GURLEY FLYNN—Member of National Committee, 1938 (Tr. 4503, 12069–71); Vice President, Communist Political Assn., 1944 (Ex. 12B); Member of National Board and National Committee of Reconstituted Party, 1945, 1948 (Tr. 3855, 4503, 6674); Chairman, National Women's Commission (Tr. 4503).

PETTIS PERRY—Member, National Committee, Communist Political Assn., 1944 (Ex. 12B); Secretary of National Negro Commission, 1948 (Tr. 4507–8); Alternate National Committee Member, 1950 (Tr. 6674).

CLAUDIA JONES—Member of National Committee, 1945 (Tr. 3855, 4504); Secretary of National Women's Commission (Tr. 4504); Alternate National Committee Member, 1950 (Tr. 6674).

ALEXANDER BITTELMAN—Representative of Politburo (National Board) 1936–7 (Tr. 1917–24); Member of National Committee, 1945 (Tr. 3855); Editor, Political Affairs (Tr. 4494); Head, Party's Jewish Bureau, 1945 (Tr. 4501); Member of Nationality Groups Commission, 1945 (Tr. 4501).

ALEXANDER TRACHTENBERG—Alternate National Committee Member, Communist Political Assn., 1944 (Ex. 12B); head International Publishers since 1935 (Tr. 1966); Chairman, National Review Commission (Tr. 4508); Director, Jefferson School (Tr. 4508); Member of Central (National) Committee, 1930's (Tr. 4508).

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VICTOR JEREMY JEROME—Editor, The Communist (Tr. 2001, 4504); Editor, Political Affairs (Tr. 4504); Chairman, National Cultural Commission (Tr. 4504); Member, National Educational Commission (Tr. 4266).

ALBERT FRANCIS LANNON—District Organizer, Baltimore-Washington, D. C. 1943 (Tr. 2415, 4506); Alternate National Committee Member, Communist Political Assn., 1944 (Ex. 12B); Member, National Committee, 1945 (Tr. 3877, 4506–7); National Maritime Coordinator, 1948 (Tr. 4542); Member, National Labor Commission, 1945 (Tr. 4542).

LOUIS WEINSTOCK—Member, National Committee, Communist Political Assn., 1944 (Ex. 12B); Member, National Committee, 1945 (Tr. 4509–10); Member, National Review Commission, 1948 (Tr. 4060, 4509–10).

ARNOLD SAMUEL JOHNSON—Organizational Secretary, Ohio 1940's (Tr. 2269–72); Member, National Committee Communist Political Assn., 1944 (Ex. 12B); Member, National Committee, 1945 (Tr. 4504); Chairman, National Nationality Groups Commission, 1949 (Tr. 4504).

BETTY GANNETT—Member, National Organization Education Committee, 1944 (Tr. 2040, 2045); Assistant National Organizational Secretary, 1945 (Tr. 4503); Member, National Education Commission, 1945 (Tr. 4503, 4266); Member,

National Youth Committee, 1945 (Tr. 4503).

JACOB MINDEL—Head, National Training School Commission, 1941 (Tr. 3582–4, 4507); Member, National Organization—Education Committee, 1944 (Tr. 2045); Member, National Cadre and Review Commission, 1945 (Tr. 3856); Member, National Review Commission, 1945 (Tr. 4507).

WILLIAM WOLF WEINSTONE—District Organizer, New York—1930's–1940's (Tr. 4510); District Organizer, Michigan—1930's–1940's (Tr. 4510); Member, National Committee—1930's–1940's (Tr. 4510); Chairman, New York State Educational Committee (Tr. 4510); Member, New York State Committee (Tr. 4510); Worker for National Education Commission, 1948 (Tr. 4510).

GEORGE BLAKE CHARNEY—Organization Secretary, Section 10, New York City 1930's (Tr. 4502); District Organizational Secretary New England 1930's (Tr. 4502); Chairman, Queens County 1940 (Tr. 2411–12); Chairman, New York County (Tr. 4502); Member, New York State Committee and Board (Tr. 4502); Member, New York State Secretariat, 1949 (Tr. 4502).

A partial summary of the Government's evidence is as follows: At the trial, the Government introduced evidence showing petitioners' activities, functioning through the apparatus of the Communist Party as it was reconstituted in

1945, advocating the overthrow and destruction of this Government by force and violence, such advocacy being for the purpose of violently overthrowing the Government as speedily as circumstances would permit.

The proof consisted of testimony of former members of the Communist Party and the introduction of books, articles, etc., which set forth the policies and program of the Party, and paralleled the proof in the *Dennis* case. As in *Dennis*, this evidence showed that in 1944, when the United States and the Soviet Union were military allies, the Party, under the leadership of Earl Browder, was reorganized as the Communist Political Association and engaged in a policy of peaceful collaboration of the classes; that in 1945, following the direction given the Party in the United States by an article published in France by the French Communist leader Jacques Duclos (Ex. 13, Tr. 2053–2079), the Communist Party was reconstituted and a system of schools and classes established for the propagation of the Marxist-Leninist principles of the overthrow and destruction of the Government by force and violence.

In June 1945, the National Committee of the Communist Political Association voted to call a national convention of the Party (Tr. 2092). Present at this important meeting were petitioners Lannon, Bittelman, Trachtenberg, Jerome, Mindel, Weinstock, Gannett, and Flynn

(Tr. 2086, 12,367–70). In the latter part of July 1945, the emergency National Convention of the Communist Political Association was held in New York City (Tr. 3851) to undo what had been accomplished in the previous convention in May, 1944. Co-conspirator Potash presided as the permanent chairman (Tr. 3858). The following petitioners attended: Gannett, Flynn, Weinstock, Johnson, Jerome, Trachtenberg, Lannon, Bittelman and Jones (Tr. 2163, 3853–4). Far from being like the conventions of a normal political party, the 1945 Party convention and later Party conventions were conducted under strict security measures. No one was admitted without being carefully screened (Tr. 3392, 4366–9, 4379–80, 4395). The press was excluded (Tr. 4380, 12420–2). At the 1948 National and New York State conventions, even the names of delegates did not appear on their passes (Tr. 4379), and not all reports to the convention were released publicly (Tr. 3081).

The delegates to the 1945 convention unanimously voted to reconstitute the Communist Party and chose William Z. Foster as its head (Ex. 17). Petitioners Flynn and Weinstock were selected as members of the Party's dominating National Board, together with co-conspirators Foster, Dennis, Williamson, Thompson, Davis, Stachel, and Potash. On the National Committee, in addition to the National Board members, were petitioners Johnson, Bittelman, Jones and Lannon, and co-conspirators Green,

Winter, Hall, Gates, Winston and Amter (named as a defendant but not tried due to illness). On the nineteen-member Cadre and Review Commission, in charge of training personnel, were petitioners Mindel and Trachtenberg (Ex. 17, Tr. 3855–6).

The evidence showed, as in *Dennis*, that absolute compliance with the Party line was insured by enforcement of the principle of democratic centralism, established at the 1945 reconstituting convention and followed at later Party conventions, a principle which was adopted from the Communist Party of the Soviet Union. The meaning of "democratic centralism" in plain language is that decisions emanating from the national organization of the Communist Party are binding on all Party members. Once a decision of the National Committee is handed down, all the subordinate bodies of the Party, down to the lowest level, must obey this decision. In this manner, with the broad powers conferred on the national leadership by the Party constitution, and within the rigid disciplinary framework imposed by the principle of democratic centralism, the national organization of the Communist Party maintains direct control of all the Party members and functionaries (Exs. 3F, 9R, 18, 66; Tr. 3403–4).

The convention adopted a constitution which dedicated the Party "to the principles of scien-

tific socialism, Marxism-Leninism" (Ex. 18, Tr. 2178).

The 1945 constitution of the Communist Party was carefully prepared, with a Party attorney on the Constitution Committee (Tr. 3857). Much of it was couched in legal protective language—"the Aesopian language of V. I. Lenin, in order to be able to defend the party legally in the courts while pursuing the practices of Marxism-Leninism" (Tr. 2229).[4]

The fact that the provisions of the Party constitution were not accepted and applied at their face value was emphasized over and over again through the testimony of many witnesses. For example, despite the Party constitution's specific provisions for a hearing, including the calling of witnesses, prior to the expulsion of any member (Ex. 18, Articles IX and X; Ex. 66, Art. VIII), the evidence is clear that these provisions were frequently honored in the breach. See testimony as to expulsion of Lautner (Tr. 4579–94), Matu-

[4] The phrase "Aesopian Language" was used among other places by Lenin in his work "Imperialism" (Ex. 20A). The publisher of the pamphlet "Imperialism", International Publishers, which was headed by Trachtenberg, explained Lenin's reference as follows:

> "'Aesopian,' after the Greek fable writer Aesop, was the term applied to the allusive and roundabout style adopted in 'legal' publications by revolutionaries in order to evade the censorship."

Another example of the use of this technique by Lenin may be found in Exhibit 39A, where he substituted the words "decisive struggle" for the words "armed uprising."

sow (Tr. 6683–4), and Markward (Tr. 8187–8). Lautner, who was Chairman of the New York State Review Commission and a member of the Party's highest disciplinary body, testified that hearings were sometimes held without witnesses, and even where witnesses were permitted the results sometimes were predetermined (Ex. MM, Tr. 6295–6). Also, testimony concerning the Goldenberg incident reveals that although certain members of the Communist Party openly advocated force and violence, contrary to the Party constitution (Exs. 18, 66), they were not expelled, nor was any disciplinary action taken against them (Tr. 4010–56). Goldenberg too was not permitted to call witnesses (Tr. 4051). The testimony of petitioner Flynn is replete with examples of how often the Party constitution was violated even in such important matters as the election of members to the National Committee (Tr. 12069–71), election to the Political Committee (Tr. 12099–103), and the failure to hold constitutionally required National Committee meetings (Tr. 12192, 12197–8).

That the petitioners in this case understood the nature and significance of the reconstitution of the Communist Party in 1945 was made clear through the direct expressions of many of them. Petitioner Jerome in the fall of 1945 criticized Browder's revisionism because—

> "* * * Browder had erroneously interpreted the phrase 'our theory is not a dogma'—to make it out that Marxism-Leninism could be turned into something other than Marxism-Leninism, that he, Jerome, intended to show that Marxism-Leninism as a theory was a principle and that an essential part of that principle was the necessity for the revolutionary overthrow of the bourgeois governments, including that of the United States just as there had been the Bolshevik revolution in Soviet Russia" (Tr. 2378–9).

A similar statement was made by Trachtenberg (Tr. 2333), and the return of the Party to the Marxist-Leninist line was regarded as a "vindication" of petitioner Mindel's teaching and training of cadres through the years of the Communist movement (Tr. 2417). Petitioner Lannon, at a Communist Party meeting during the latter part of 1945, said that in the event of war with the Soviet Union, the policy of the Communist Party in this country must be one of sabotage not only in war industries but in all industries, so that the United States Government would be unable to support a war and the public would be unwilling to do so (Tr. 7610–11). Shortly before Christmas, 1945, Lannon stated that at a time of depression the revolutionary situation would be ripe, and that the help of the Red Army was necessary

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in order to accomplish the revolution, and he described the preparations being made by the Soviet army and air force from which an attack against the United States could be launched (Tr. 7612–13).

When the Party was reconstituted in 1945, the Party reemphasized its program of concentration upon recruiting persons employed in basic industries and plants in accordance with the Party's pre-1945 teaching.[5] At the 1945 convention, Williamson, the Organizational Secretary (Tr. 3859), called for a policy of concentration on basic industrial workers in "industrial towns such as McKeesport, Schenectady, Youngstown, Akron, Flint, Gary and towns in the Anthracite and West Virginia" (Ex. 22E, p. 815). See also National Board Resolution, June 2, 1945 (Ex. 14).

In 1946, at a meeting of the National Committee, co-conspirator Williamson called for greater efforts from the leading comrades in the maritime, auto, steel, electric, radio and leather industries (Ex. 62C). He pointed out that "in all concentration industries, we must work to establish strong Party organization in the key plants and then extend our influence from them to the areas which surround them" (Ex. 62B). In October, 1947, Williamson again urged that the Communist

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[5] "* * * Party organizers should be always conscious to bring forward, develop—and cultivate and develop basic industrial workers in the Party into professional revolutionaries" (Tr. 3719).

Party leaders "pay particular heed to the workers in basic industry, coal, steel, power, and so forth, because control of them is essential to proletarian revolution" (Tr. 7761).

In December, 1948, it was co-conspirator Winston who restated the policy of building the Party in the steel industry, shipyards, coal mines and manufacturing plants. He instructed the Party youth to "get out of New York and to get out into the Midwest into basic industries" in order to get "a nucleus of workers on the side of the Communist Party * * * so that in the event of any imperialistic war * * * we could help the side of the Soviet Union" (Tr. 6625–6626).

Petitioner Gannett, at a meeting of the National Committee in September, 1949, reminded the Party that the tasks outlined in Winston's report remained the guide to industrial concentration, and she concluded that "building the Party among the workers in industry is linked to our ability to fulfill the tasks history has placed before our Party." By this date, the Party was active in key shops in the auto industry, the longshore industry, as well as in the steel and rubber industries (Ex. 65E).

The New York State and New York County organization of the Communist Party gave special emphasis to concentration in the critical transportation industry. Thus, the longshore, teamsters and railroad sections of the Party

operated directly under the State Party leadership (Tr. 3884–87). A New York County Committee meeting of the Party which included among those present petitioners Charney, Weinstone and Lannon (Tr. 3968–70) was concerned with the progress of the Party's concentration task in the following focal points of the transportation industry: the Pennsylvania Railroad yards, the New York Central freight yards, and the waterfront along the Hudson River with its longshoremen, seamen, and teamsters (Tr. 3892–93; 3948–50; Ex. 64B). The importance of the transportation industry to the Party's concentration activity is emphasized by the statement of the national organizer in the railroad unit of the Communist Party when he met with a group of about thirty-five Party members in St. Louis, Missouri, directing them to recruit the railroad workers: "Remember this, as what Lenin said, you can never hope to have a successful revolution unless you have the railroad workers with you" (Tr. 8952–53).

The Party slogan enunciated by petitioner Bittelman, "Every Shop must become a fortress of Communism, * * *" (Ex. 45D), aptly describes the efforts of the Party in the basic industries.

Late in the summer of 1948, the three members of the New York State Secretariat of the Party met with the government's witness Lautner under conditions of extreme secrecy to set up the under-

ground structure of the Communist Party for New York State, under the plan set forth by William Z. Foster at a National Committee meeting (Tr. 4441–43; 4443–44). Present at this meeting were Robert Thompson, New York State chairman of the Communist Party, a member of the National Board who was convicted in the *Dennis* case and became a fugitive; William Norman Marron, a fugitive named as a defendant in the instant indictment; and Hal Simon.

Thompson drew an outline for the Party's underground structure, dividing the state into three areas (Tr. 4443–53, Ex. 82). The complete structure took in seven levels (Tr. 6126, Ex. 82). The structure was designed in such a way that any one person knew the identity of only six other members of the underground (Tr. 4453). Thompson stated that experience in Europe indicated that this structure would give the utmost protection to every Party member integrated into the structure, and would guarantee that the Party would function under any and all conditions as an organized force (Tr. 4453). By the end of 1949, the New York State underground structure had been built in Area One to the 6th level (Tr. 6141), in Area Two to the 4th level (Tr. 6137, 6139), and in some parts of Area Three to the 5th level (Tr. 6138).

In addition to the vertical underground structure, certain other measures were taken, for which petitioner Charney coined the phrase "horizontal"

structure (Tr. 4473), to prepare for the underground activities of the Party. These measures included provisions for hiding Party leaders, message centers, printing apparatus, acquisition of paper supplies in such manner as to conceal the source, storing Party literature in secure places, and obtaining high-powered radio receiving and transmitting sets (Tr. 4454–65, 4473–74). Also, there were assembled lists of Party members who could be entrusted with sums of money up to $20,000 each (Tr. 4487–89).

These preparations were not restricted to New York. The evidence showed that similar steps were also taken in St. Louis (Tr. 9000–1), Ohio (Tr. 8204–5, 8435), and Detroit (Tr. 7200, 7230, 7271–74).

The foregoing program was in addition to other measures taken by the Party and these petitioners throughout the country. These included: breaking the sections and clubs into small groups (Tr. 3951; 3967; 3994; 7203–4; 7253–56; 8409); destruction of membership lists and discontinuance of issuance of Party membership cards (Tr. 6635; 7235; 7257–58; 8205; 8409; 8439; 8441–42; 8695; 8733; 8997); forbidding use of the telephone or mails on important Party business (Tr. 4396–9, 7200, 8408–9); and use of false names (Tr. 1919; 3186; 3353; 12741; Exs. 69, 118, 120). These measures were a revival of similar secret and conspiratorial measures used by the Party in

the 1930's (Tr. 1916–19; 1961; 2443–44; 2720–24; 3317–18; 6253; 6294; 7509).

At the June 1945 National Committee meeting attended by petitioners Lannon, Bittelman, Trachtenberg, Jerome, Mindel, Weinstock, Gannett and Flynn, as well as many of the co-conspirators named in the indictment, the initial action was taken toward returning the Party to its revolutionary Marxist-Leninist line, after the Communist Political Association period of the Party (Tr. 2086–2087). Thus, at this meeting co-conspirator Williamson instructed that:

> The first task connected with the present-day functioning of the CPA as a Marxist political party, is that of organizing the most thorough study of Marxism-Leninism by the membership and all our cadres * * * that during the summer, and in preparation for the reopening of schools in the fall, there shall be instituted an examination of the curricula, outlines, textbooks, methods of teaching and personnel of all schools. This shall be combined with an intensive course of re-educating the educators (Ex. 15F).

This emphasis on the return to true Marxism-Leninism via lectures and schools was carried out at the emergency convention itself. Co-conspirator William Z. Foster, the leader of the Party, spoke at the emergency convention attended by petitioners Lannon, Trachtenberg, Jerome, Bittelman, Johnson, Jones, Weinstock, Gannett and

Flynn (Tr. 3851–54) concerning the forthcoming tasks in the struggle against Browder's revisionism, as follows:

> "As never before, we must train our Party in the fundamentals of Marxism-Leninism. To this end we must check over the curricula, teaching personnel and textbooks of all our schools" (Ex. 22D).

On the national level, two commissions were concerned with educational duties, the Educational Commission and the National Training School Commission (Ex. 74A). Petitioner Flynn testified that the National Board "recommended" the subject matter to be taught in Party schools (Tr. 12656). What courses were to be taught, how they were to be conducted, when they were to be held and who was to attend, were some of the problems which came before these Commissions (Exs. 62F, G, 73). These Commissions reported directly to the National Board or National Committee, and their directives were passed on to the State or District Boards. On the State level, at least in New York, the Training School Commission was under the aegis of the Educational Commission (Ex. 74A; Tr. 406). The decisions of the State Board were in turn handed down to the county organization which also had its educational director; thence to the section level and the club level, both of which had their own educational directors (Exs. 74A, 62F and G). In this manner, decisions which emanated from

the National Commissions were disseminated through the Party organization to the lowest level—the community branch or shop club.

Petitioners Jerome and Gannett were members of the National Educational Commission during the period of the conspiracy (Tr. 4266) and from 1947 to the indictment in 1951 petitioner Gannett was in charge of the National Education Department (Tr. 12658, 12662); petitioner Weinstone was head of the New York State Educational Commission at the same time (Tr. 4263); petitioner Mindel was head of the National Training School Commission when the witness Lautner went to the 1941 National Training School (Tr. 3585). Petitioner Gannett as education director of the Party reported directly to the National Committee (Tr. 12662).

Party schools were conducted at all levels. There were National Training Schools (Exs. 62G, 113; Tr. 3180, 3581, 7364, 7741); Regional Training Schools (Ex. 111; Tr. 7723, 8309); State Schools (Ex. 73; Tr. 8998); Section Schools (Tr. 3378, 4081–2); Community Schools (Tr. 6597); and Club Schools (Tr. 4081, 7716).

The extent to which the Party leadership was indoctrinated in the principles of Marxism-Leninism may be seen in a report by petitioner Weinstone to the 1948 New York State Convention. He stated that the New York State party had organized 40 full-time, carefully supervised training schools which were attended by 572 high level function-

aries. Of this total, twenty-six were 9-day schools which enrolled 272 comrades, chiefly from the shops of concentration clubs. Since many of the industrial workers could not leave their employment to attend a full time school even for a short period, 60 special training schools were organized for industrial and trade-union leaders, which were attended by 514 functionaries (Ex. 73; Tr. 4081–82). A renewed program must be undertaken by the State Committee, Weinstone stated, which would assume responsibility for training a substantial number of branch leaders in the industrial and concentration areas. This training must assume a new and higher quality because: "The present situation demands that our leading personnel be more advanced in the knowledge of Marxism-Leninism." In addition to emphasizing organized classes, Weinstone stressed the importance of independent self-study in mastering the theory of Marxism-Leninism (Ex. 73, Exs. 68A, B, C).

At the same time that this cadre or leadership training program was being carried out, there was also under way a program for Party members. In New York alone, between 1945 and 1948, approximately 8200 Communist Party members attended schools and classes which were directed by the State Educational Department. Over 425 club classes had been organized during the same period (Ex. 73). This activity was part of the over-all national program to give at least an in-

troductory course in basic Marxist-Leninist principles to 25,000 club members and additional thousands of new recruits. The New York State Educational Commission of the Communist Party, under the direction of Weinstone, gave "unstintingly" of both forces and money to achieve this aim (Exs. 73, 62F and G).

Most of the petitioners, together with their co-conspirators, were at different times students, teachers or administrators in Party schools (Tr. 3187, 3353, 3378, 3582, 7369, 7414, 7725, 7744, 7746, 7747, 7758). The record contains testimony about teaching at approximately fifteen different Communist Party schools and classes (Tr. 3352, 3378, 3582, 4060, 4343, 6598, 6602, 6608, 7365, 7723, 7725, 7744, 7750, 8328). As stated above, the schools were conducted at all levels of the Party, extending from National Training Schools* attended by high Party leaders, to

* The National Training Schools represented the ultimate in Party education. In October 1947, a National Training School was held in New York in which petitioners Bittelman, Jerome, Gannett and Mindel, together with co-conspirators Siskind and Williamson had taught classes (Tr. 7746, 7761–62). Petitioner Jerome, in urging the students to concentrate on the Communist classics, told them they should remember that "Marxism-Leninism is not a dogma but a guide to action" which "we do not read in the abstract like esthetes" (Tr. 7758).

Siskind stated:

"* * * that the history of all revolutions, particularly the three Russian revolutions of this century, show the true revolution as distinguished from mere reform, that can only come about through violent, forceful action on the part of

the new-member classes attended by recent recruits. Almost invariably the entire student body was told to use only first names or aliases, to be careful about sending and receiving mail, and to be guarded in the use of the telephone (Tr. 7727–9, 8330, 8998, 9056–7).

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the oppressed class, aimed at the ruling class; that, therefore, only by violent, forceful action on the part of an armed proletariat could the capitalistic state machinery and the capitalistic society, the capitalistic class, be destroyed" (Tr. 7731).

Petitioner Mindel headed the 1941 National Training School which was limited to seven students, four of them district or state organizers and the other three high Party officials (Tr. 3581–6, 3846). Co-conspirator Siskind taught the students that in bourgeois democracies it is impossible to establish socialism except by revolution (Tr. 3587, 3590; Ex. 56); that specifically as to the United States of America the fundamental political demand is "direct transition" to the dictatorship of the proletariat and that transition would be made "by the destruction of the bourgeois state, complete destruction of the bourgeois state" (Tr. 3647–48; Ex. 57B). Siskind taught, from "Problems of Leninism" by Joseph Stalin (Ex. 47E), that the "peaceful transition" theory is the theory of the reformists, and has "nothing in common with Leninism" (Tr. 3663–4), and that—

"* * * peaceful co-existence is not possible for a long period. For a certain period of time, a transitionary period of time, that is to the advantage of the Soviet Union, that will gather its strength and it will be in a better position for a final struggle against imperialism. That is a Leninist policy. That is a revolutionary policy. That is not a pacifist policy" (Tr. 6277–8).

Petitioners Trachtenberg, Flynn and Bittelman participated in the 1938 National Training School (Tr. 7414, 7370). As a climax to their six months' training, Bittelman told the students:

These schools and classes taught the students that the Communist Party is an international party based on the principles of the proletarian revolution and the dictatorship of the proletariat (Tr. 3404–05); that, because of the refusal by the capitalists to accede, socialism can only come about by the seizing of power and the overthrow of bourgeois society under the leadership of the Communist Party (Tr. 6608–10); that under bourgeois democracy it is easier to prepare the working class for the seizure of power (Exs. 116, 7, 70H); that the only way the working class could free itself was by "violent revolution" and "overthrow of the capitalist class" (Tr. 8338, also cf. Tr. 7730); that Browder was under the mistaken conception that the contradictions of capitalism could be peacefully resolved (Ex. 115); that the method by which Communism would come to power in this country was through violent forceful action by the proletariat in order

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"* * * that in order to have a victorious revolution and in order for the working class to be able to defeat one's own government, to overthrow one's own government, and to seize power, in order to establish a victorious dictatorship of the proletariat, it was necessary to have a party of a new type, a type of party that Lenin built and taught the Bolsheviks to build in Russia, a Communist Party, a party that was grounded in the fundamentals of Marxist-Leninist theory * * * a Communist Party of this type which was being built in the countries throughout the world could carry through a successful revolution, could overthrow one's own government, seize power and establish the dictatorship of the proletariat, that would continue to smash the rule of the old state and set up the new Soviet rule" (Tr. 7416–17).

to destroy the capitalistic state machinery and the capitalistic class (Tr. 7731).

In addition to the classes and schools, the Party also organized the sale and distribution of the Communist Party classics for independent self-study in mastering Marxism-Leninism (Tr. 3125, 3374, 3380–2, 3406, 3482, 4473, 6642, 7716, 8087; Exs. OOO series, NNN series, 73, 68A, B, C). Thus, an important tool of the conspiracy was International Publishers which published the Marxist-Leninist classics and most of the exhibits involved in this case. This publishing concern has been headed, at least since 1935, by petitioner Trachtenberg (Tr. 1966, 2273). As head of International Publishers and in his capacity as a leading Communist Party functionary, Trachtenberg made reports to meetings of the National Committee concerning the sale and distribution of Marxist-Leninist literature (Tr. 2273).

There was no serious dispute at the trial as to the use by the Party and these petitioners of the Marxist-Leninist classics as basic text-books in the schools, classes and clubs. Indeed, they have not contested that fact here (e. g., Pet. 54, 66).

As in the *Dennis* case, the evidence here shows that the core and keystone (Ex. 47C) of the Communist Party's program for accession to power is the dictatorship of the proletariat. The ramifications inherent in the dictatorship of the

proletariat are set forth over and over again in the Marxist-Leninist classics used in the Party schools. As defined by Stalin in classic and well-known words:

> * * * the dictatorship of the proletariat is the domination of the proletariat over the bourgeoisie, a domination that is untrammeled by law and based on violence and enjoys the sympathy and support of the toiling and exploited masses * * * (Ex. 4E).

It was proved here, as in *Dennis*, that the dictatorship of the proletariat is the fundamental thesis of Marxism-Leninism, and it cannot exist without violence (Exs. 4B, 4E, 7B, 7D, 90, 47F, 59B, 59D, 59E). The dictatorship of the proletariat can be established only by the violent overthrow of the existing capitalist government—that is, by the proletarian revolution. History teaches us, according to Marxist-Leninists, that no entrenched bourgeoisie will peacefully yield its power and that, therefore, the only method of achieving power is by violent overthrow of the ruling class and its government. As analyzed in "The History of the Communist Party of the Soviet Union" (p. 9):

> Marx and Engels taught that it was impossible to get rid of the power of capital and to convert capitalist property into public property by peaceful means, and that the working class could achieve this only by revolutionary violence against the bour-

> geoisie, by a *proletarian revolution,* by establishing its own political rule—the dictatorship of the proletariat—which must crush the resistance of the exploiters and create a new, classless, Communist society (Ex. 9T).

Lenin expressed the same thought in "State and Revolution" as follows (pp. 19–20):

> We have already said above and shall show more fully later that the teaching of Marx and Engels regarding the inevitability of a violent revolution refers to the bourgeois state. It *cannot* be replaced by the proletarian state (the dictatorship of the proletariat) through "withering away," but, as a general rule, only through a violent revolution * * *
>
> The replacement of the bourgeois by the proletarian state is impossible without a violent revolution. * * * (Ex. 7B).

Stalin wrote:

> Can such a radical transformation of the old bourgeois system of society be achieved without a violent revolution, without the dictatorship of the proletariat?
>
> Obviously not. To think that such a revolution can be carried out peacefully within the framework of bourgeois democracy, which is adapted to the domination of the bourgeoisie, means one of two things. It means either madness, and the loss of normal human understanding, or else an open and gross repudiation of the proletarian revolution * * * (Ex. 59C).

See also Exhibits 4E; 9M, 9P, 9Q, 9R, 9S, 57A, 47E, 47C.

The doctrine of Marxism-Leninism teaches that before the existing capitalist government may be overthrown, a "revolutionary situation" must exist. Two types of factors must coincide before a successful revolution can be carried out. These factors are described as "subjective conditions" and "objective conditions" (Ex. 70M).

Objective conditions are beyond the control of any individual and will arise as a result of the inherent contradictions of the capitalist system. Lenin describes the objective conditions as follows: 1. It is impossible for the ruling classes to maintain their power unchanged, due to a national crisis affecting both the exploited and the exploiters; 2. The wants and sufferings of the oppressed class become more acute than usual; 3. In consequence of the above there is a considerable increase in the activity of the masses who in stormy times are drawn into independent historic action (Ex. 57D).

Not every revolutionary situation, however, leads to revolution. To the objective conditions must be added subjective ones—"* * * namely, the ability of the revolutionary *class* to carry out revolutionary mass actions *strong* enough to break (or to crack) the old government, which never, not even in a period of crisis, 'falls' unless it is 'dropped'" (Exs. 57D, 70M).

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At the trial, petitioners stressed their day-to-day activities and claimed that they advocated a peaceful transition to socialism by means of reforms. However, Stalin's "Foundations of Leninism" (Ex. 4C), declares:

> The revolutionist will accept a reform in order to use it as a means wherewith to link legal work with illegal work, in order to use it as a screen behind which his illegal activities for the revolutionary preparation of the masses for the overthrow of the bourgeoisie may be intensified.

The "History of the Communist Party of the Soviet Union" (Ex. 9Z, p. 111) teaches:

> Hence, the transition from capitalism to Socialism and the liberation of the working class from the yoke of capitalism cannot be effected by slow changes, by reforms, but only by a qualitative change of the capitalist system, by revolution.
>
> Hence, in order not to err in policy, one must be a revolutionary, not a reformist.

At the trial, petitioners also contended that the united front policy developed at the Seventh World Congress of the Communist International in 1935 is still applicable, and that under this policy a peaceful transition to socialism is possible by means of a coalition government (A. App. 154 et seq.). But the evidence shows that Marxist-Leninists do not regard the united front policy as affecting any basic changes in the theory of the proletarian revolution and the dictatorship

of the proletariat. Exhibit 70–O refers to the "new tactical orientation" (p. 36) developed by the Seventh World Congress. Dimitroff, the prime exponent of the united front tactic, stated:

> But while it is sufficient for the establishment of the united front of the Communist and Social-Democratic Parties to have an agreement of struggle against fascism, the offensive of capital and war, the achievement of political unity is possible only on the basis of a number of definite conditions involving principles.
>
> * * * * *
>
> *Third,* on condition that the necessity of the *revolutionary overthrow of the rule of the bourgeoisie* and the establishment of the *dictatorship of the proletariat in the form of Soviets* be recognized * * * (Ex. 29). [Italics in original.]

Lenin and Stalin both specifically stated that the law of violent proletarian revolution is applicable to the United States (Exs. 7C, 4B). Petitioners and their co-conspirators have specifically approved and relied upon these words of the masters of communism in schools for teaching and advocacy. (See Ex. 70J, p. 16.)

ARGUMENT

1. *The Charge.*—The petitioners contend that their conviction must be set aside because the trial judge failed to instruct the jury that they must look only to the acts and declarations of

each defendant, or those of other persons affirmatively authorized or ratified by such defendant, in determining whether such individual defendant specifically intended to bring about the violent overthrow of the government of the United States as speedily as circumstances would permit. That is, they contend that the charge erroneously permitted the jury to consider the acts and declarations of co-conspirators in determining whether each defendant had such an intent. This contention is premised upon the petitioner's reading of this Court's decision in *Dennis* v. *United States,* 341 U. S. 494, as holding that the existence of such a specific intent is a constitutional prerequisite to the application of the Smith Act, which, they assert, otherwise would be constitutionally vague (Pet. 14–21). From this basis, they argue that the requisite intent must be actual and personal to the particular defendant, and, as such, can be determined only from his own acts and declarations or those of others which he has specifically authorized or ratified. Conversely, they contend that under the Smith Act, uniquely, the acts and declarations of co-conspirators may not be considered in determining the intent of a defendant. We submit, with the court below (A. App. 189–192), that the contention is without merit.

The trial judge refused to give a charge requested by petitioners which embodied their

present contention (Pet. 22), and the court below expressly approved, holding that ordinary conspiracy rules controlled and that "the rule admitting acts and declarations of co-conspirators in furtherance of the conspiracy against all defendants applies equally to motive and intent as to other issues." (A. App. 189–192.) However, the court below may have found that the judge actually charged the jury in accordance with the substance of petitioner's contention. Thus, in its opinion, the court below went on to state that "The appellants also contend, in effect, that the ordinary conspiracy rule—requiring a showing of conspiracy, including in this instance the requisite unlawful intent, to be made against each defendant, before the acts and declarations of third parties are admissible against him—was not observed by the trial judge. They say that it appears from the charge that the Court considered that participation in the conspiracy did not involve showing that a defendant intended to cause the violent overthrow of the Government, but rather that intent was a separate issue from participation." (A. App. 193.) Thereafter, the court below concluded that "we do not think that any part of the charge can properly be read as meaning that a defendant could be found to be a 'participant' in the conspiracy charged without possessing such an intent" and that such intent must be found "on the basis of each de-

fendant's own conduct" (A. App. 195–196).[1] Reading together both portions of the opinion of the court below, it may have meant, what we do not question, that participation in a conspiracy must include knowledge of the general nature of the conspiracy, and that there must be evidence that a particular defendant participated with such knowledge before the acts and declarations of co-conspirators can be attributed to him as proof of his specific intent or ultimate purpose. However, if the court below held that to show each petitioner's participation in the conspiracy there must be independent proof (before considering the acts and declarations of co-conspirators)

[1] The Court of Appeals noted that the trial judge instructed the jury that the participation of a particular defendant must be determined "without regard to and independently of" the acts and declarations of others (A. App. 196). The trial judge then told the jury "participation" meant wilful participation which he defined as—

> with the specific intention and for the evil purpose of bringing about the overthrow or destruction of the Government of the United States by force or violence (A. App. 167).

Since the trial judge charged that initial participation of a defendant in the conspiracy could be shown only from a defendant's own acts and declarations and then stated that initial participation must include a finding of the specific intent to overthrow the Government by violence, the Court of Appeals may have considered that he had charged that such specific intent could be found only from a defendant's own acts and declarations.

of his specific intent to bring about the violent overthrow of the Government, we think it erred, and that, if the trial judge gave such a charge to the jury, it was unduly favorable to the petitioners.

a. Contrary to the petitioners, we cannot find in the opinion of Chief Justice Vinson, or in the concurring opinions of Justices Frankfurter and Jackson, in *Dennis* v. *United States, supra,* any intimation that the Constitution (as distinguished from the statute) limits the application of the Smith Act to those persons who, in addition to engaging in conduct prohibited by that Act, do so with the specific intent of bringing about the violent overthrow of the Government of the United States as speedily as circumstances would permit. Instead, the late Chief Justice stated (341 U. S. at 499):

> Congress was concerned with those who advocate and organize for the overthrow of the Government. Certainly those who recruit and combine for the purpose of advocating overthrow intend to bring about that overthrow. We hold that the statute requires as an essential element of the crime proof of the intent of those who are charged with its violation to overthrow the Government by force and violence.

Thus, the opinion holds both that the intent requirement derives from the statute (rather than

the Constitution), and also that the existence of the requisite intent is to be determined from the inherent nature of the conspiracy and from other facts and circumstances. Here and elsewhere (341 U. S. at 500), the Court appeared to assume that the element of intent was to be established as in criminal cases generally. Moreover, we submit that none of petitioner's quotations (Pet. 18–20) from the opinions in *Dennis* v. *United States*, *supra*, suggests that without such a specific criminal intent the Act would be unconstitutionally vague as applied to leaders of the Communist Party of the United States.

b. It is well established that the criminal purpose or intent of a party to a conspiracy may be established by proof of the acts and declarations of co-conspirators in furtherance of the conspiracy. Thus, in *Pinkerton* v. *United States*, 328 U. S. 640, 647, this Court stated that "Motive or intent may be proved by the acts or declarations of some of the conspirators in furtherance of the common objective. *Wiborg* v. *United States*, 163 U. S. 632, 657–658." See also *Hitchman Coal & Coke Co.* v. *Mitchell*, 245 U. S. 229, 249, and *American Fur Co.* v. *United States*, 2 Pet. 358, 365. The trial judge clearly charged the jury that the acts and declarations of alleged co-conspirators could not be attributed to a particular defendant without other and independent evidence that he had combined with them. Such a charge, which permitted the jury to determine from the acts and declarations of the conspirators

both the purpose of the conspiracy and the intent of each conspirator, was in accord with the settled principles. Under the petitioners' contention, especially since intent is so large an element in the crime of conspiracy, it is hard to see what value the acts and declarations of co-conspirators could have as a proof of the conspiracy if, before using them, the jury must find from independent evidence both the existence of a combination and the specific purpose and intent of its participants (as distinct from knowledge of the general purpose of the conspiracy which participation implies). *United States* v. *Dennis,* 183 F. 2d 201 at 230–231. In the present case, as in *Dennis,* the most significant evidence of each petitioner's purpose is found in the operations of the Communist Party of which he or she is a directing spirit, rather than in isolated personal acts and declarations.

In brief, the petitioners seek to make the Smith Act unenforceable by engrafting upon it rules of evidence and procedure unknown to other Federal criminal proceedings. As Mr. Justice Jackson put it in *Dennis* v. *United States,* 339 U. S. 162, 174, "Courts should give to a Communist every right and advantage that they give to any defendant. But it is inconceivable that being a Communist can entitle a defendant to more."

2. *The denial of a hearing on the issue of "clear and present danger."*—In their "Questions Presented," petitioners list the question of whether (Question 3, Pet. 2) they "were entitled to a trial

or hearing of the issue of clear and present danger by either the trial judge or the jury." The trial judge denied such a hearing. In the Court of Appeals, the petitioners did not present the question of whether they were entitled to such a hearing, but proceeded on the assumption that this issue, as defined in *Dennis* v. *United States, supra,* was determinable by the Court of Appeals through taking judicial notice of historical and current events. In their present petition, the petitioners do not discuss this hearing issue beyond listing it under their Questions Presented. Under these circumstances they may be precluded from raising the question in this Court.

In *Dennis,* 341 U. S. at 510, this Court held that the clear and present danger concept, as applied to the Smith Act, means that:

> * * * In each case [courts] must ask whether the gravity of the "evil," discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.

It was specifically held (p. 513) that this "is a judicial rule to be applied as a matter of law by the courts" and that (p. 515) "the issue is properly one for the judge to decide."

Moreover, there is not the slightest suggestion in this Court's decision in *Dennis* that the trial judge in a Smith Act case must hold a hearing, as requested by the petitioners, for the purpose of determining whether their conspiracy, viewed in

the light of recent world conditions and Communist activities, presents such a danger that the Smith Act may be applied. As in *Dennis*, such a conclusion of law can be drawn by appellate courts as well as by trial judges, with or without a hearing. Such a conclusion does not involve a finding of fact in the usual sense, but rather a determination that there exist circumstances, including the nature of the Communist Party and the international relationships of the United States, which would justify Congress in concluding that petitioners' conspiracy endangers fundamental interests of the nation. It is clear that the *Dennis* principle was so applied in that case. Thus, the opinion of Chief Justice Vinson, in which Justices Reed, Burton and Minton joined, expressly approved the concurrent legal conclusions of the trial court and Court of Appeals, based upon judicial notice rather than a hearing record, that the requisite danger existed (341 U. S. 510–511). The nature and function of these conclusions was further defined by Mr. Justice Frankfurter in his concurring opinion, as follows (341 U. S. at 547):

> * * * But in determining whether application of the statute to the defendants is within the constitutional powers of Congress, we are not limited to the facts found by the jury. We must view such a question in the light of whatever is relevant to a legislative judgment. We may take

> judicial notice that the Communist doctrines which these defendants have conspired to advocate are in the ascendancy in powerful nations who cannot be acquitted of unfriendliness to the institutions of this country. We may take account of evidence brought forward at this trial and elsewhere, much of which has long been common knowledge. In sum, it would amply justify a legislature in concluding that recruitment of additional members for the Party would create a substantial danger to national security.

Against this background, Mr. Justice Frankfurter added (341 U. S. at 551):

> To make validity of legislation depend on judicial reading of events still in the womb of time—a forecast, that is, of the outcome of forces at best appreciated only with knowledge of the topmost secrets of nations—is to charge the judiciary with duties beyond its equipment.

Similarly, Mr. Justice Jackson concluded that "The judicial process simply is not adequate to a *trial* of such far-flung issues" (341 U. S. at 570 [emphasis added]).

We submit that there was plainly no error in the trial judge's denial of a hearing on this issue.

3. *The existence of a "clear and present danger."*—Petitioners contend that "Neither the evidence adduced at the trial nor the facts judicially noticed by the trial judge showed the existence of

the clear and present danger, as defined in *Dennis*, which is necessary to the constitutional application of the Smith Act" (Pet. 32–52). This contention misreads the *Dennis* decision.

The jury's verdict established, conclusively for this aspect of the case, that the petitioners conspired to teach and advocate the violent overthrow of the Government of the United States with the specific intent to bring about such overthrow as speedily as circumstances would permit. The Government's evidence showed that this conspiracy was carried on through the Communist Party of the United States, and that these petitioners were top leaders of the Party in close collaboration with the *Dennis* defendants. The *Dennis* defendants were indicted in July 1948, and were convicted in October 1949. In *Dennis*, this Court stated that it was in accord with the conclusion of the trial judge in that case, as articulated by the Court of Appeals (183 F. 2d at 212–213), that the American Communist conspiracy, in the context of world conditions, presented the requisite degree of danger. In essence, the instant case involves leading participants in the same conspiracy during the period from June 1948 to June 1951, when the indictment was returned. Judge Dimock's conclusion as to danger in this case was based upon the same factors which this Court approved in *Dennis*, reinforced by later evidence of Communist infiltration and aggression in such areas as Korea and

Indo-China (Tr. 13671–3). Surely, as the court below noted, "if the danger was clear and present in 1948, it can hardly be thought to have been less in 1951, when the Korean conflict was raging and our relations with the Communist world had moved from cold to hot war" (A. App. 205–206).

The thrust of the petitioners' argument on this point is that the courts below (and this Court) should come to a contrary conclusion on the basis of petitioners' analysis of the principles and tactics of Marxism-Leninism and of the role played by Communist parties in France, Italy, China, Russia, Germany, and the United States (Pet. 35–52). The petitioners' present version of their Marxist-Leninist program has been rejected by the jury, as noted above. Moreover, leaving aside the well-known fact that nowhere have Communists obtained or risked power in a free and honest election, petitioners' argument again mistakes the judicial function in determining whether the Smith Act constitutionally may be applied. This Court's decision in *Dennis* stands for the proposition that the courts need only determine that there exist circumstances in the context of which the Congress, which has primary responsibility for the security of the United States, could reasonably conclude that the activities prescribed by the Smith Act would endanger that security. This Court's affirmative determination in *Dennis* is controlling here.

Moreover, in 1950, Congress enacted the Internal Security Act (64 Stat. 987), Section 2 of which contains the findings of Congress as to the nature and purposes of the Communist movement abroad and in this country during the period covered by this indictment. Referring to these findings in *Carlson* v. *Landon,* 342 U. S. 524, 535–536, this Court stated that:

> * * * We have no doubt that the doctrines and practices of Communism clearly enough teach the use of force to achieve political control to give constitutional basis, according to any theory of reasonableness or arbitrariness, for Congress to expel known alien Communists under its power to regulate the exclusion, admission and expulsion of aliens.

Similarly, in *Galvan* v. *Press,* 347 U. S. 522, 529, the Court noted that:

> * * * On the basis of extensive investigation Congress made many findings, including that in § 2 (1) of the [Internal Security] Act that the "Communist movement * * * is a world-wide revolutionary movement whose purpose it is, by treachery, deceit, infiltration into other groups (governmental and otherwise), espionage, sabotage, terrorism, and any other means deemed necessary, to establish a Communist totalitarian dictatorship" * * *. Certainly, we cannot say that this classification by

Congress is so baseless as to be violative of due process and therefore beyond the power of Congress.

Thus, it is clear that petitioners are inviting this Court to substitute its judgment for that of Congress as to the impact of their conspiracy upon the security of the United States. In various contexts presented by the Communist threat to the free world, this Court repeatedly has refused to do so.

4. *The sufficiency of the evidence.*—In this Court, petitioners contend that "The evidence was insufficient in law to establish each petitioner's guilt beyond a reasonable doubt" (Pet. 52). The court below stated that "As the appellants on this appeal do not directly challenge the sufficiency of the evidence as a whole to sustain their convictions, we need not consider the evidence in detail, save to say that we are satisfied that it was ample both to require the submission of the case to the jury and to sustain its verdict" (A. App. 188). The petitioners concede that they did not raise or press in the court below the issue as to the general sufficiency of the evidence (Pet. 52–53).[8] It is clear that because of their failure to do so, they are now asking this Court to determine the

[8] Petitioners, recognizing this deficiency, refer to their discussion of portions of the evidence which they cited in argument on other points in their brief in the Court of Appeals (Pet. 52–53).

sufficiency of the evidence from a 17,000-page record without the benefit of a detailed analysis by the court below. This circumstance alone would warrant denial of certiorari on this issue. *National Labor Relations Board* v. *Pittsburgh Steamship Co.*, 340 U. S. 498, 502-503; *Blair* v. *Oesterlein Co.*, 275 U. S. 220, 225.

The jury, by its verdict, found that petitioners had an intent to cause the overthrow or destruction of the Government of the United States by force and violence as soon as circumstances would permit, and that it was with this intent and for the purpose of furthering that objective that they conspired to teach and advocate the duty and necessity of overthrowing the Government by force and violence. As shown in the Statement, *supra*, the evidence before the jury substantially paralleled that in *Dennis*. Indeed, these petitioners were found to have conspired with the *Dennis* defendants and were their close and important collaborators. In both cases, the Government presented the testimony of former high-ranking Communists buttressed by the writings of petitioners and their co-conspirators and by other Marxist-Leninist writings endorsed and used to further the conspiracy.

In his charge, the trial judge set forth the defendants' contentions (A. App. 153–158), substantially as petitioners set them forth here (Pet.

52–68).[9] In arriving at their determination of guilt, the jury, with ample support in the record, rejected as incredible the version of the evidence advanced by petitioners that language which seemingly calls for the forcible overthrow of the Government or for the shattering of the governmental apparatus does not mean what it appears to mean.

As the case comes before this Court, the sole issue relating to the sufficiency of the proof is whether "there was some competent and substantial evidence before the jury fairly tending to sustain the verdict." *United States* v. *Socony Vacuum Oil Co.*, 310 U. S. 150, 254; *Glasser* v. *United States*, 315 U. S. 60, 80; *Abrams* v. *United States*, 250 U. S. 616, 619. We submit that the evidence which the jury believed not only amply supports, but in fact compels, the verdict which the jury returned.

5. *Lautner's testimony.*—Petitioners contend that admission of the testimony of John Lautner

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[9] The trial judge included in his summary to the jury the contention which petitioners are now advancing: that adoption by the Party in 1935 of the united front policy had changed the basic Party program (A. App. 154). As we have shown in our Statement, there was evidence that the United Front program was merely a "new tactical orientation" which did not affect basic strategy; that the Communist Party would form political unity with any other group only on condition that such a group recognize "the necessity of the revolutionary overthrow of the rule of the bourgeoisie and the establishment of the dictatorship of the proletariat in the form of Soviets." (*Supra*, p. 33.)

as to the circumstances of his expulsion from the Communist Party constituted reversible error in that (1) such evidence was inadmissible as irrelevant and not attributable to the petitioners, and (2) if admissible, its probative value was so outweighed by its tendency to inflame that it should have been excluded. This contention is fully treated in the opinion of the court below (A. App. 196–202). In brief, Lautner, a former chairman of the New York State Review Commission of the Communist Party, testified that he was lured to a cellar in Cleveland and was there threatened with violence and compelled to sign a statement that he had been accused of being a government agent and also that he had received a fair and impartial hearing. As the court pointed out, this evidence tended to prove two of the Government's contentions: (1) that the petitioners' conspiracy as embodied in the Communist Party functioned, not as an ordinary political party, but as a highly disciplined group "such as might be expected of a revolutionary organization," and (2) that Lautner's expulsion was in violation of the provision of the Party's constitution that "all persons concerned in disciplinary cases shall have the right to appear, bring witnesses, and testify." From this evidence that the Party's constitution was not observed in practice, together with evidence of violation of other provisions of that constitution, including those

relating to the election of the National Committee (Tr. 12,069–71), election to the political committee (Tr. 12,099–103), and holding National Committee meetings (Tr. 12,192, 12,197–8), the jury were entitled to disbelieve the provision of the Party constitution purporting to reject the tactics of violence, upon which the petitioners relied heavily in their defense. While Lautner's testimony was dramatic proof of such divergence between precept and practice, its probative value was far too great to warrant its exclusion on any theory of tendency to inflame. And, as the court below pointed out (A. App. 201), the participation of petitioners Weinstock and Trachtenberg, and their co-conspirators Norman, Thompson, Simon and Kling in the Lautner affair, fully justified the admission of Lautner's testimony against all of the petitioners as proof of acts of co-conspirators in furtherance of the conspiracy.

Petitioners' reliance upon the exclusion of this testimony in other Smith Act cases is equally without merit. The question is whether it is competent, relevant and material testimony in this case where its direct link with petitioners and their co-conspirators has been shown.

6. *The challenge to the jury lists.*—Petitioners challenge their conviction on the grounds that "(1) the jury lists, panels and array from which the petit jury was drawn were intentionally and

systematically limited to mere token representation of Negroes, Puerto Ricans and manual workers; (2) the responsible jury officials failed to carry out the statutory and constitutional mandate to employ such methods and procedures as would ensure a representation of a cross-section of the community; and (3) the basic jury list was so weighted with and loaded by the numerically small but economically dominant groups in the community as to preclude a fair and impartial trial in this case in view of the special interest which such groups have in silencing the defendants in a Smith Act prosecution." (Pet. 79–80). We submit that this contention is without substance for the reasons set forth in detail in the opinion of the court below (A. App. 228–249), as well as in the opinion of Judge Dimock (A. App. 27–59). However, we would emphasize that even assuming that improper results were produced by the system of jury administration in the Southern District of New York which was upheld by the court below in *United States* v. *Dennis*, 183 F. 2d 201, the opinions below in the instant case demonstrate that such assumed results were substantially diluted by the time of this trial by the other methods used to obtain prospective jurors since the *Dennis* trial.

7. *The denial of a continuance.*—Petitioners also complain that the denial of their motions for a continuance and for mistrial forced them to

stand trial in a nation-wide "atmosphere of prejudice against them created by agencies of the United States Government" (Pet. 95). This contention was treated at length in the opinion of the court below (A. App. 216–228). It is likewise without merit. Here, as in the *Dennis* case, leaders of the Communist Party of the United States are contending, in effect, that they cannot be tried under the Smith Act as long as there exists widespread rejection of their methods and objectives and those of the Soviet Union. To the contrary, as Judge Hand put it in *United States* v. *Dennis*, 183 F. 2d at 226, dealing with the identical contention, "those who may have in fact committed a crime cannot secure immunity because it is possible that the jurors who try them may not be exempt from the general feelings prevalent in the society in which they live." And see *Shushan* v. *United States*, 117 F. 2d 110 (C. A. 5), certiorari denied, 313 U. S. 574. Petitioners' position differed in no respect from that of those persons who were tried for treason during World War II. *Cramer* v. *United States*, 325 U. S. 1; *Stephan* v. *United States*, 133 F. 2d 87 (C. A. 6), certiorari denied, 318 U. S. 781.

In this Court, the petitioners particularly complain of the alleged prejudicial effect of the issuance in June 1952, during the trial, by the Senate Judiciary Subcommittee on Internal Security of a 16-page pamphlet entitled *Documentary Proof*

that the Communist Party, U. S. A., Teaches and Advocates the Overthrow and Destruction of the United States Government by Force and Violence. They contend that the issuance of this document by a subcommittee of the Congress is proof of their thesis of a deliberate governmental attempt to create against them a climate of prejudice in which they could not obtain a fair trial. This pamphlet consisted in large part of quotations from writings of Marx, Engels, Lenin, and Stalin and from published comments on those writings by American Communist leaders, including the petitioners Weinstone and Bittelman. It also referred to Bittelman as having been indicted under the Smith Act.

The court below correctly held that this matter was without significance in view of the fact that the jurors stated that they had not read the pamphlet, the care with which the jury were selected, and the charge to the jury (A. App. 219–229). Moreover, under the petitioners' contention, the enactment by Congress of the Internal Security Act would preclude their trial for an indefinite period. We submit that in a world context which found the United Nations repelling Communist aggression in Korea, it hardly could be expected that the legislative, political and diplomatic organs of the Government should become silent and inert during this litigation. In any event, the situation was totally unlike that in

Delaney v. *United States*, 199 F. 2d 107 (C. A. 1), upon which petitioners largely rely, for in the *Delaney* case a Congressional subcommittee held widely publicized hearings in the city of trial, focused directly and specifically upon the alleged derelictions for which the defendant was to be tried in a few weeks.

8. *The alleged misconduct of jurors.*—Petitioners contend that the trial judge erred in denying their motion for a mistrial based upon the alleged misconduct and prejudice of jurors and in denying a further hearing on this matter. The contention is fully discussed in the opinion of the court below (A. App. 206–216). In brief, after a Mrs. Julia van Dernoot had telephoned Harold Cammer, a former attorney for the petitioners in this litigation, "to get information on Marxism," and discussed with him a conversation she had had with juror Mrs. Kane, she addressed a letter to the trial judge, during the trial, stating that she had heard Mrs. Kane state that the jurors "felt that the defendants were all Marxists and that Marxists certainly all wanted to overthrow the Government by force." After a careful interrogation of Mrs. Kane and the other jurors, the trial judge excused Mrs. Kane from the jury, but denied petitioners' motion for mistrial. On the following day, one of petitioners' counsel submitted to the trial court an affidavit reciting that on the preceding evening Mrs. Kane

had telephoned counsel to accuse four unnamed jurors of expressing views adverse to the defendants, and moved for a further investigation of the jury and reconsideration of the motion for a mistrial. The trial court denied this motion on the basis of his evaluation of Mrs. Kane's personality and on the ground that his prior interrogation of the remaining jurors left him with a "deep impression" of their impartiality.

The court below was clearly correct in refusing to disturb the painstaking exercise of discretion by the trial judge. *Reynolds* v. *United States*, 98 U. S. 145, 156–157. Moreover, it should be noted that the court below felt that "the circumstances of how this [van Dernoot] letter came into being were far from satisfactorily explained" (A. App. 208). Where a similar issue was presented under strange circumstances in *Dennis* by the so-called Nathanson "affidavit," the court below affirmed the trial court's refusal to remove the challenged juror or to undertake the delicate task of exploring the jurors' mental processes. 183 F. 2d at 228–229. Here, where both these safeguards were employed, petitioners clearly were entitled to no more.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 442

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UNITED STATES OF AMERICA.

MOTION IN SUPPORT OF PETITION FOR CERTIORARI

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MOTION IN SUPPORT OF PETITION FOR CERTIORARI

The Moving Parties

This motion is presented on behalf of the appellants in *Yates, et al.* v. *United States,* No. 13480, United States Court of Appeals for the Ninth Circuit, on appeal from the United States District Court for the Southern District of California, Central Division; *Huff, et al.* v. *United States,* No. 14320, United States Court of Appeals for the Ninth Circuit, on appeal from the United States District Court for the Western District of Washington, Northern Division; *United States* v. *Mesarosh, et al.,* No. 11169, United States Court of Appeals for the Third Circuit, on appeal from the United States District Court for the Western District of Pennsylvania; and *Wellman, et al.* v. *United States,* No. 12237, United States Court of Appeals for the Sixth Circuit, on appeal from the United States District

Court for the Eastern District of Michigan, Southern Division.

In each of the above cases the appellants have been convicted of conspiracy to violate the Smith Act (18 U. S. C. sec. 371, 2385) and their appeals from such convictions are presently pending before the Courts of Appeals indicated above. In the *Yates* and *Mesarosh* cases oral arguments on the appeals have already been had and the cases submitted for decision. If the Court of Appeals in any of said cases should sustain the judgment of conviction against the moving parties, the moving parties will then petition this Court for a writ of certiorari.

Relief Sought

Through this motion the moving parties respectfully request the Court to grant the petition for certiorari heretofore filed in *Flynn, et al.* v. *United States,* or, in the alternative, to defer action upon said petition pending the outcome of their appeals and the filing of petitions for writs of certiorari, should such steps become necessary.

Reasons for Granting the Motion

Since this Court decided *Dennis* v. *United States,* 341 U. S. 494, more than one hundred persons have been indicted under the Smith Act in various parts of the country. In addition to the cases enumerated above, trials have been completed in Philadelphia, Pennsylvania; St. Louis, Missouri; and Hawaii; while cases are awaiting trial in Denver, Colorado; New Haven, Connecticut; Cleveland, Ohio; and Puerto Rico. In all of the indictments which have thus far been handed down the same conspiracy is charged. Each group of alleged conspirators is charged with conspiring with all of the defendants in the *Dennis* case to accomplish the same objects as the conspiracy charged in that case. In

some of the cases a few co-conspirators in addition to the *Dennis* defendants are also named in the indictment. In all of the cases with the exception of the *Yates* case the conspiracy is alleged to have begun in April, 1945.*

This huge, ever-expanding conspiracy is tried and retried in each case in essentially the same way and on the basis of the same legal theories. The prosecution presents its case through a series of informers who proceed from trial to trial presenting the same testimony. These informers are supplemented by local informers. The "national" informers are usually cast in the role of "experts." They expound in case after case their version of the meaning of Marxist-Leninist theory. They testify also concerning schools that they attended, classes which they taught and individuals whom they knew as Communists in the remote past. When their identification efforts are incomplete, they are supplemented by local informers. The systematic use of these witnesses, subject as they are in political cases to extraordinary pressures to distort, steadily to expand the scope of their recall to meet prosecutive needs, and to misrepresent, has reached proportions which seriously compromise the administration of justice.

Because the experience of these witnesses is necessarily limited, the testimony which they offer is frequently highly remote in time and of dubious competence. In order to overcome the vices inherent in the remoteness of the testimony, the prosecution offers it on the theory that it describes the ends and aims of the Communist Party or that it is "background." Where the testimony as to what has been taught is attributed to a defendant in a particular case, it is admitted to show his intent.

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* In the *Yates* case the original indictment also charged this date as the inception of the conspiracy (*United States* v. *Schneiderman*, 102 F. Supp. 87, 89), but it was superseded by an indictment charging a new starting date, June 28, 1940, the effective date of the Smith Act (106 F. Supp. 906).

Since political expressions necessarily change with changing world conditions, the defendants in these cases, including the moving parties here, find that they are convicted for a version of their teachings which is obsolete and does not correspond to their teaching and advocacy in the indictment period.

Moreover, many of the informers have no personal familiarity with the defendants in these cases and are unable to testify as to their teaching and advocacy. The result is that the defendants are convicted upon the theory that each declarant is really a co-conspirator whose out-of-court statements are binding upon the defendants. The result of this process has been to stretch the conspiracy which forms the basis of the *Dennis* case into an enormous affair covering thousands of participants in all parts of the country and reaching back in time for periods as much as twenty-five years prior to the finding of the indictments. The original thesis of the *Dennis* case that the conspiracy commenced in 1945 with the reconstitution of the Communist Party is likewise discarded in favor of the view that the conspiracy commenced at some unspecified time in the distant past and continues up until the present.

In the same way scant heed is paid in the trial of these cases to the proof necessary to establish each defendant's connection with the conspiracy. In the last analysis the connection is based primarily upon the fact that the defendant is a member of the Communist Party or an officer in one of its organizational bodies. These trials really rest upon a concealed outlawry of the Communist Party; there is no meaningful distinction between open outlawry and a determination that conspiratorial guilt flows from identification with it. Moreover they are wholly inconsistent with—and indeed make meaningless—the provisions of Section 4(f) of the Internal Security Act of 1950 (50 U. S. C. Sec. 487(f)).

Because these cases are tried in essentially the same way, they give rise to common legal issues. While of course there are certain differences among the cases, and points which are raised on the appeal of some of them are not raised on the appeal of others, there are key problems which unify them calling for appellate solution. The cases involved in this motion also present issues which are not presented by the *Flynn* case and the resolution of which would be unaffected by the Court's decision in the *Flynn* case. However, it is also true that each and all of the cases present in common the important issues set out in this motion.

In the *Dennis* case this Court indicated that the decision was to be confined to the facts there presented and that any attempt to expand its scope so as to invade civil rights would not be countenanced. This is the meaning of the Court's warning that (341 U. S. at 516):

> "Where there is doubt as to the intent of the defendants, the nature of their activities, or their power to bring about the evil, this Court will review the convictions with the scrupulous care demanded by our Constitution."

All of these cases have been tried in substantial disregard of the duty of courts to administer statutes invading civil liberties with refinement and precision so that those who fall outside their literal reach are assured the maximum protection from intimidation in the exercise of the protected freedoms. It is difficult to ascertain from reading the record in any of these cases that the exercise of constitutional rights is at issue.

This is seen with particular clarity in the administration of the clear and present danger standard. Trial courts in these cases treat the issue of clear and present danger in either of two ways. They may, as in the *Flynn* and *Mesa-*

rosh cases, find the existence of clear and present danger primarily by mechanically lifting the finding of Chief Justice Vinson from the *Dennis* case without regard to the changing political situation. Or, as in the other cases, simply by announcing that there is a clear and present danger without offering any supporting reasons therefor. In the *Yates* case the trial court took neither of these alternatives, but found that clear and present danger was not an element of the offense and that, if it was, it could be established solely by proof of the conspiracy supported by the required intent. Moreover, courts have, as in the *Flynn* case, uniformly refused to grant the accused a hearing on the issue of the clear and present danger and an opportunity to demonstrate that no clear and present danger exists.

All of the cases, like the *Flynn* case, raise such additional questions as these:

1. What is the meaning and content of the *Dennis* rule on clear and present danger?

2. May a judge announce the existence of a clear and present danger on the basis of considerations plucked from his consciousness?

3. If the trial judge does resort to extrinsic data in support of a finding that a clear and present danger exists, what, if any, are the limitations upon the character of the data resorted to?

4. If the process of judicial notice is to be resorted to by the judge, are the defendants to be denied an opportunity to demonstrate that the propositions involved are not properly subject to notice?

5. Can a trial court completely disregard the objective character of the clear and present danger standard by equating proof of clear and present danger with proof of intent?

The trial courts in the four cases involved in this motion treated the issue of proof of individual intent in sharply differing ways. In the *Mesarosh, Yates* and *Huff* cases the trial courts instructed the juries that the specific intent required to satisfy the Constitution is an essential element of the offense and that it has to be proved through the statements made and the acts done or omitted by the accused and not through the statements and acts of third parties. However, in the *Wellman* case the trial court made the same errors complained of in questions 1 and 2 of the *Flynn* petition.

It is not surprising that there repeatedly arises in these cases—as in the *Flynn* case—serious problems of guilt by association. This is a historically recurrent problem which is created when the drive for repression outruns the Constitutional insistence upon proof of individual guilt. The Court should deal with this question now, for it will continue to plague defendants and trial judges in all Smith Act prosecutions.

As a matter of fact, appellate review is required in the *Flynn* case because imbedded in it in one form or another are problems which characterize all of the new "rounds"—the second round, the third round, etc. A denial of the petition will leave these vexing problems unsolved and the boundaries of the *Dennis* case unmarked. Moreover, reverberation of such a denial will unquestionably influence the determination of the pending appeals. Most important, such a denial will stimulate a dragnet use of the

Smith Act and a wholesale intimidation of the exercise of protected civil liberties.

Dated, December 21, 1954.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 442

ELIZABETH GURLEY FLYNN, PETTIS PERRY, CLAUDIA JONES, ALEXANDER BITTELMAN, ALEXANDER TRACHTENBERG, VICTOR JEREMY JEROME, ALBERT FRANCIS LANNON, LOUIS WEINSTOCK, ARNOLD SAMUEL JOHNSON, BETTY GANNETT, JACOB MINDEL, WILLIAM WOLF WEINSTONE and GEORGE BLAKE CHARNEY,

Petitioners,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITIONERS' REPLY BRIEF

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Cohen & Nagel, An Introduction to Logic and Scientific Method, 157 11

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Respondent.

PETITIONERS' REPLY BRIEF

The trial judge's charge and the question of intent.

Neither the respondent nor the Court below has come to grips with the basic contention of the petitioners that: The clear and present danger standard as defined in *Dennis* is not sufficiently definite to give fair notice of the circumstances in which utterances are punishable under the Smith Act; hence, the Act may be applied, consistently with the First and Fifth Amendments, only if the accused is shown, by evidence that is rationally probative thereof, to have *actually* and *personally* entertained the specific intent to teach and advocate the overthrow of the Government by

force and violence and to bring such overthrow about as speedily as circumstances will permit (Pet. 14-21). All that the respondent says in answer to this contention is: "We submit, with the court below (A. App. 189-192), that the contention is without merit" (G. Br. 34).* But the Court below said nothing which demonstrates that the contention is without merit. Indeed, one will search its opinion in vain for so much as a *discussion* of the contention.

The first part of petitioners' contention is that if, as a majority of the Court held in *Dennis*,** utterances are punishable under the Smith Act only if they create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent, clear and present danger as there defined does not "give adequate guidance to those who would be law-abiding" (*Musser* v. *Utah*, 333 U. S. 95, 97) of the circumstances in which their utterances will be punishable.

This part of petitioners' contention is sustained not only by the criticisms which Justices FRANKFURTER and JACKSON levelled at the plurality's clear and present danger standard (341 U. S. at 551 and 570, respectively; quoted in Pet. 19-20.‡ It is supported by the plurality opinion itself. For, as we pointed out in the petition for certiorari, at p. 18, that opinion frankly acknowledged that the standard is "indeterminate" and "subject to criticism on the score of indefiniteness" (341 U. S. at 515-516). A standard of guilt which suffers from such shortcomings does not "give adequate guidance to those who would be law-abiding" (*Musser* v. *Utah, supra*). If it can be constitutionally applied at

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* We thus refer to the Government's Brief in Opposition to the petition for certiorari.

** This majority consisted of the four Justices who joined in the plurality opinion of the Chief Justice, and of Justices Black and Douglas.

† Justices Frankfurter and Jackson thought that clear and present danger was not necessary to the constitutional application of the Smith Act. But this does not detract from the force of their criticism of the clear and present danger standard as defined in the plurality opinion.

all, it can be applied only to those who are *actually* possessed of an evil intent; for it is only they who may not complain that the standard fails to "give adequate guidance to those who would be law-abiding." That this was the rationale on which the plurality opinion sustained the application of the Smith Act to the *Dennis* defendants is made clear by the following quotation therefrom, 341 U. S. at 515:

> "There remains to be discussed the question of vagueness—whether the statute as we have interpreted it is too vague, not sufficiently advising those who would speak of the limitations upon their activity. It is urged that such vagueness contravenes the First and Fifth Amendments. This argument is particularly nonpersuasive when presented by petitioners, who, the jury found, intended to overthrow the Government as speedily as circumstances would permit. See *Abrams* v. *United States*. 250 U. S. 616, 627-629 (1919) (dissenting opinion); *Whitney* v. *California*, 274 U. S. 357, 373 (1927) (concurring opinion); *Taylor* v. *Mississippi*, 319 U. S. 583, 589 (1943). A claim of guilelessness ill becomes those with evil intent. *Williams* v. *United States*, 341 U. S. 97, 101-102 (1951); *Jordan* v. *De George*, 341 U. S. 223, 230-232 (1951); *American Communications Assn.* v. *Douds*, 339 U. S. at 413; *Screws* v. *United States*, 325 U. S. 91, 101 (1945)."

When a standard of guilt affecting speech is so vague and indefinite that it does not give adequate guidance to those who would be law-abiding, proof of an accused's evil intent would seem to be the minimum requirement of the First and Fifth Amendments. For it would be as offensive to the prohibitions and guarantees of the First Amendment, as it would be violative of the due process requirement of the Fifth, to apply such a standard to one not possessed of an evil intent (*Winters* v. *New York*, 333 U. S.

507, 517-520). The Court below therefore erred when, disregarding all that was said in this Court in the *Dennis* case, it fell back on its own prior holding in that case, saying: "The appellants' argument encounters at the threshold an obstacle in the *Dennis* case, in which, as appellants seem to recognize, we found the Smith Act constitutional independently of its intent provisions. 183 F. 2d at page 214" (A. App. 190).

It was because the Court below failed to recognize that the Smith Act as construed in this Court in the *Dennis* case is too vague and indefinite to give adequate guidance except, perhaps, to those *actually* possessed of the specific evil intent to advocate and bring about the overthrow of the Government by force and violence, that it failed to appreciate the validity of petitioners' contentions that (1) proof of such intent is not only a statutory, but a constitutional requirement, and (2) since such intent has to be *actually* and *personally* possessed by an accused, in order to support a constitutional application of the Act to him, it may be proved only by his own acts and declarations and those of others which he has actually authorized or ratified. For it is only such acts and declarations that are rationally probative of the *actual* state of mind that must be shown (Cf. Pet. 23-28).

Although the Court below saw nothing in petitioners' contention that the constitutionality of the application of the Smith Act to them depended on proof of their *actual* and *personal* possession of the required evil intent, it held that, even if the contention were valid, it was proper to permit the jury to consider, on the issue of their intent, the acts and declarations of alleged co-conspirators, though not authorized or ratified by petitioners, on the theory that such acts and declarations constituted circumstantial evidence of their intent (A. App. 191-192). To be sure, a man's intent may be proved by circumstantial evidence. However,

as the Court below itself said more than a quarter of a century ago, in *Rumely* v. *United States*, C. C. A. 2, 293 Fed. 532, 551, cert. den., 263 U. S. 713, "Circumstantial evidence is that evidence which tends to prove a disputed fact, by proof of other facts which have a legitimate tendency to lead the mind to a conclusion that the fact exists which is sought to be established." The acts and declarations of one conspirator do not, however, constitute evidence of the state of mind of another. For it is a truism that nothing that one may say or do can ever be evidence of another man's state of mind, unless the latter has actually authorized it or, with knowledge thereof, has adopted or ratified it. The theory on which the acts and declarations of one conspirator are admitted and usable against another in the ordinary conspiracy case, is not that they are *evidentiary* of the latter's state of mind. It is that the latter is *chargeable* with them *as if* he had done and made them himself (Pet. 24-28). Whatever the justifications may be for the use, in other contexts, of one conspirator's acts and declarations against another, they can have no application here. For, as we said at pages 23-24 of the petition for certiorari:

> "Now, it would seem to be equally clear that if a vague and indefinite standard of guilt may be cured by the accused's evil state of mind, the state of mind that must be proved is one that *he himself* has *actually* possessed, and one that is deduced or inferred from facts which are rationally *probative* of an individual's mental state. For the function which the accused's state of mind must perform is to fill the gap in the standard of guilt. That is to say, his *actual* state of mind must be such that he needs no *warning* from the standard. To permit anything else to sustain a conviction under a vague standard of guilt, is to make a mockery of the principle that only an evil state of mind may compensate constitutionally for the lack of warn-

> ing in the standard. *For then the accused may be convicted although he has had neither warning from the standard nor a state of mind that makes warning to him constitutionally unnecessary.*"

Finally, the Court below sought to sustain petitioners' convictions on the theory that the trial judge had instructed the jury not to consider the acts and declarations of alleged co-conspirators on the issue of their intent until they had first found the existence of such intent solely "on the basis of each defendant's own conduct" (A. App. 195-196). The trial judge's charge does not support the theory or assumption of the Court below. Not even the Government suggests that it does. For in its Brief in Opposition it says (G. Br. 36-37):

> "However, *if* the court below held that to show each petitioner's participation in the conspiracy there must be independent proof (before considering the acts and declarations of co-conspirators) of his specific intent to bring about the violent overthrow of the Government, we think it erred, and that *if* the trial judge gave such a charge to the jury, it was unduly favorable to the petitioners." (Emphasis added.)

What the theory of the Court below comes down to is this: That because the trial judge instructed the jury that they had to determine "as to each defendant, whether or not he became a *member* of the conspiracy * * * without regard to and independently of the statements and declarations of others" (A. App. 141), he must *also* be deemed to have instructed them that they could not consider third party acts and declarations as evidence of such defendant's *intent to advocate and bring about the overthrow of the Government by force and violence,* unless they first found on the basis of the defendant's own acts and declarations that he had such intent. The fact, however, is that other

portions of the charge unmistakably show that when the trial judge spoke of "membership" and "participation" in the conspiracy, he did not include, and made it clear to the jury that he did not include, as an element of "membership" or "participation", the specific intent to overthrow the Government by force and violence (A. App. 166-167). Hence, it cannot be said that when he instructed them to determine each petitioner's "membership" or "participation" in the conspiracy "without regard to and independently of the statements and declarations of others", he also meant and they understood him to mean that they should first determine each petitioner's specific intent to advocate and bring about the overthrow of the Government by force and violence without regard to and independently of the statements and declarations of others, before considering such statements and declarations of others. His instruction concerning the manner in which the jury was to determine each petitioner's "membership" or "participation" in the conspiracy, reads as follows (A. App. 141):

> "In considering whether or not a particular defendant became a member of the conspiracy, you must do so without regard to and independently of the statements and declarations of others. *In other words, you must determine the initial participation of a particular defendant from the evidence concerning his own actions, his own conduct, his own declarations, or his own statements, and his own connection with the actions and conduct of others.*" (Emphasis added.)

That the trial judge did *not* intend, by the above instruction, to require the jury to determine each petitioner's intent to overthrow the Government by force and violence "without regard to and independently of the statements and declarations of others" is established by the following: (1) That he made no reference to such intent in the instruction; and (2) that he made it clear to the jury in a

later portion of his charge that such intent was an element of the crime separate and distinct from "membership" and "participation" in the conspiracy, which intent they had to find *in addition* to "membership" and "participation", in order to return a verdict of guilty. Thus, in a section of the charge *which was not at all concerned with the question of what evidence the jury could consider in arriving at a verdict,* he instructed them as follows (A. App. 166-167):

> "If a defendant is to be convicted under this law, he must not merely have conspired to advocate and teach the duty and necessity of overthrowing or destroying the Government by force and violence; the state makes such conduct unlawful only when persons have so conspired 'knowingly' or 'wilfully,' and the indictment so charges these defendants.
>
> "Thus the question of intent enters into the offense charged. *If you find that the defendants, or any one of them, participated in the conspiracy charged in the indictment, one of the questions for you to consider and determine is whether they acted wilfully.* This is a question of their intent. To convict any defendant you must be satisfied from the evidence beyond a reasonable doubt, with respect to him individually, that he had an intent to cause the overthrow or destruction of the Government of the United States by force and violence, and that it was with that intent and for the purpose of furthering that objective that he conspired to teach and advocate the duty and necessity of overthrowing or destroying the Government of the United States by force and violence. And you must further find that it was the intent of the defendant to achieve this goal of the overthrow or destruction of the Government of the United States by force and violence as speedily as circumstances would permit it to be achieved.

"Stated another way: I charge you that it is not enough for the prosecution to show the existence of an agreement and the participation therein of any particular defendant. This alone would not prove that such defendant participated in the agreement 'knowingly and wilfully.' With respect to each defendant, the prosecution has the further burden of proving beyond a reasonable doubt that such defendant participated in such agreement wilfully; that is, the prosecution must prove that such defendant entertained the specific intention to teach or advocate the duty or necessity of overthrowing or destroying the Government of the United States by force and violence and that he intended to teach or advocate such doctrine with the specific intention and for the evil purpose of bringing about the overthrow or destruction of the Government of the United States by force or violence, and not that he intended some result other than that." (Emphasis added.)

From which it follows that when the trial judge told the jury, in the instruction which petitioners complain of that except "in determining the question of the initial participation of a particular defendant in the alleged conspiracy," they could consider, as against all the petitioners, all acts and declarations of alleged conspirators during the conspiracy period, he authorized them to predicate their finding of each petitioner's intent on nothing but such acts and declarations.

It is apparent that the Government misconceives petitioners' contention when it asserts that "petitioners seek to make the Smith Act unenforceable by engrafting upon it rules of evidence and procedure unknown to other Federal criminal proceedings" (G. Br. 39). The truth is that the Smith Act has no claim to enforcement, consistently with the First and Fifth Amendments, except in respect

to those who are shown, by evidence that is rationally probative thereof, to have had actually and personally the specific intent to advocate and bring about the overthrow of the Government by force and violence. Hence, petitioners seek only the recognition of their constitutional rights when they contend that the intent necessary to a constitutional application of the Act to them shall be established by such evidence.

As to the existence of clear and present danger.

The respondent's position seems to be that it is not open to the petitioners to contest the existence of clear and present danger. For it says (G. Br. 44):

> "This Court's decision in *Dennis* stands for the proposition that the courts need only determine that there exist circumstances in the context of which the Congress, which has primary responsibility for the security of the United States, could reasonably conclude that the activities proscribed by the Smith Act would endanger that security."

This is obviously wrong. For in *Dennis* the plurality opinion declared, 341 U. S. at 514:

> "We hold that the statute may be applied where there is a 'clear and present danger' of the substantive evil which the legislature had the right to prevent. Bearing as it does, the marks of a 'question of law,' the issue is properly one for the judge to decide."

The issue of "clear and present danger" not only bears the "marks of a 'question of law' ". It also includes a most important question of fact. For, as Judge Learned Hand said in *Dennis*, 183 F. 2d at 215:

> " '[C]lear and present danger' depends upon whether the mischief of repression is greater than the

gravity of the evil, discounted by its improbability; and *it is of course true that the degree of probability that the utterance will bring about the evil is a question of fact.*" (Emphasis added.)

If "the degree of probability that the utterance will bring about the evil is a question of fact", it goes without saying that it must be decided on the basis of evidence. For the decisions of courts, no less than those of other departments or agencies of government, "must be the result of a process of reasoning" (Mr. Justice BURTON, *Joint Anti-Fascist Refugee Comm.* v. *McGrath*, 341 U. S. 123, 136). And "legal reasoning is no different from any other kind of reasoning, unless it be spurious legal reasoning" (Judge LEARNED HAND, *United States* v. *Pugliese*, 2 Cir., 153 F. 2d 497, 500). "Whether a proposition has or has not a degree of probability on definite evidence, does not depend on the state of mind of the person who entertains the proposition. Questions of probability, like questions of validity, are to be decided entirely on objective considerations, not on the basis of whether we feel an impulse to accept a conclusion or not." (Cohen & Nagel, *An Introduction to Logic and Scientific Method*, 157).

The respondent also suggests that this Court's decision in *Dennis* "is controlling here" on the question of clear and present danger (G. Br. 44). That cannot be so, if the question is one that must be decided on evidence, whether adduced in the usual way or judicially noticed. For these petitioners offered to prove to the trial judge and laid before the Court below facts (Appendix to Petition, 95-139), not presented or offered to any court in the *Dennis* case, which require it to be said that there was no probability at or prior to the time of their indictment that any attempt at the violent overthrow of the Government would be made (Pet. 32-52). As a matter of fact, the Government's own

version of the teaching and advocacy of Marxism-Leninism goes far to sustain petitioners' thesis. For at p. 31 of its Brief in Opposition, the Government says:

> "The doctrine of Marxism-Leninism teaches that before the existing capitalist government may be overthrown, a 'revolutionary situation' must exist. Two types of factors must coincide before a successful revolution can be carried out. These factors are described as 'subjective conditions' and 'objective conditions' (Ex. 70M).
>
> "Objective conditions are beyond the control of any individual and will arise as a result of the inherent contradictions of the capitalist system. Lenin describes the objective conditions as follows: 1. It is impossible for the ruling classes to maintain their power unchanged, due to a national crisis affecting both the exploited and the exploiters; 2. The wants and sufferings of the oppressed class become more acute than usual; 3. In consequence of the above there is a considerable increase in the activity of the masses who in stormy times are drawn into independent historic action (Ex. 57D).
>
> "Not every revolutionary situation, however, leads to revolution. To the objective conditions must be added subjective ones—' * * * namely, the ability of the revolutionary *class* to carry out revolutionary mass actions *strong* enough to break (or to crack) the old government, which never, not even in a period of crisis, "falls" unless it is "dropped"' (Exs. 57D, 70M)."

No one—neither the Government nor the courts below—has suggested that there was any probability at or prior to the time of the indictment of the petitioners that any of the aforementioned conditions would arise in the United States. If this be so, how can it reasonably be said that

there was any probability at that time of an attempt at violent overthrow? For, as was said in the Petition for Certiorari, pages 40-41:

> "The charge against these petitioners is that they were adherents of and agreed to teach and advocate the principles of Marxism-Leninism, which the Government contends include the teaching and advocacy of the overthrow of the Government of the United States by force and violence. Now, it would seem clear that if this body of theory teaches that an attempt at governmental overthrow may be made *only* when a host of specified conditions, both subjective and objective, concur—and expressly precludes and prohibits such an attempt in the absence of any of such conditions—the probability of an attempt at overthrow by the adherents of that theory can be said to exist only to the extent that there is a probability that the conditions prerequisite to such an attempt will arise. This must be so, unless there is ground for saying that the alleged conspirators did not really intend to make an attempt at overthrow dependent on the occurrence of such conditions. For in the absence of such ground, it is only on the basis of the agreement actually made by the alleged conspirators, that one can say whether or not there is any probability that they will act. Hence, if they have agreed to act *only* in the context of certain conditions and *not* to act in their absence, it is obvious that the probability of their acting *must* be measured by the probability of the occurrence of the conditions they have set for their acting."

The Government is apparently quite conscious of the fact that a "clear and present danger", even as that phrase was interpreted by the plurality opinion in *Dennis*, cannot be said to have existed at the time of petitioners' indictment. It has therefore evaded, rather than answered, petitioners'

contentions on that score. Thus it relies on *Dennis* as "controlling here", notwithstanding that petitioners have shown by incontrovertible evidence and unanswered argument what was not shown in *Dennis*, namely, that there was no probability at the time of petitioners' indictment that an attempt at the violent overthrow of the Government would be made. It also invokes the verdict of the jury, notwithstanding that the issue of clear and present danger was not submitted to or decided by the jury, but decided by the trial judge. Even if the Government were warranted in saying, as it does at page 43 of its Brief in Opposition, that, "The jury's verdict established, conclusively for this aspect of the case, that the petitioners conspired to teach and advocate the violent overthrow of the Government of the United States with the specific intent to bring about such overthrow as speedily as circumstances would permit," there still remains for determination by this Court the question whether, on the evidence, it is true to say that there was any probability at the time of petitioners' indictment that such circumstances would arise.

Finally, the Government has the hardihood to suggest that because Congress has made certain legislative findings concerning the aims and purposes of the Communist movement (G. Br. 45-46), not even this Court may determine the issue of clear and present danger, nothwithstanding that the constitutionality of the application of the Act to these petitioners depends upon the existence of such a danger (G. Br. 46). That this position is utterly untenable is made clear by the plurality opinion in *Dennis*, which declares, 341 U. S. at 513:

> "When facts are found that establish the violation of a statute, the protection against conviction afforded by the First Amendment is a matter of law. The doctrine that there must be a clear and present danger of a substantive evil that Congress has a right to prevent

is a judicial rule to be applied as a matter of law by the courts. The guilt is established by proof of facts. Whether the First Amendment protects the activity which constitutes the violation of the statute must depend upon a judicial determination of the scope of the First Amendment applied to the circumstances of the case."

As to the sufficiency of the evidence.

As the petition for certiorari shows, the question of the sufficiency of the evidence was raised "over and over again throughout the brief" in the Court below (Pet. 52-53). Hence, the question is properly raised as one of those presented for review by this Court (*Blair* v. *Oesterlein Mach. Co.*, 275 U. S. 220, 225). It is of more than passing interest that the Government has not denied the following statement at p. 67 of the petition for certiorari:

> "With the possible exception of but one petitioner, there is no evidence that any of them said or did anything during the period covered by the indictment and for many years prior thereto which could reasonably be interpreted as evidence of an understanding or belief that the principles of Marxism-Leninism taught or advocated the duty or necessity of overthrowing or destroying the Government of the United States by force and violence. As to most of them, there is no evidence that they *ever* said or did anything evidencing such an understanding or belief. As for the remaining petitioners, the acts or declarations attributed to them were so remote in point of time, almost all of them antedating the indictment by approximately fifteen years, that they were devoid of a vitality sufficient in law to support a conclusion that they understood or intended the reconstituted Party—which dedicated itself to the achievement, through the

electoral process, of a people's front government, based on an anti-fascist coalition—to teach and advocate the forcible and violent overthrow of the Government."

It would seem clear that if the foregoing is true and if we are right in the contention that the jury could not properly consider the unauthorized and unratified acts and declarations of alleged co-conspirators as evidence of petitioners' specific intent to advocate and bring about the violent overthrow of the Government, the evidence was insufficient in law to establish petitioners' guilt.

Lautner's testimony.

The Brief in Opposition, far from overcoming the contentions made in the petition concerning the admissibility of Lautner's testimony, actually fortifies them. For it exposes the hollowness of the pretense that that testimony—particularly that portion of it which dealt with the personal violence offered Lautner in Cleveland—had any rational tendency to prove any fact relevant to petitioners' guilt. The Government contents itself with repeating the assertion of the Court below that not only the fact of Lautner's expulsion, but the details of the personal violence practiced in Cleveland, was properly admitted, on the theory that it tended to prove "that the petitioners' conspiracy as embodied in the Communist Party functioned, not as an ordinary political party, but as a highly disciplined group 'such as might be expected of a revolutionary organization'" (G. Br. 49). There was absolutely no evidence which would warrant the inference that acts or conduct such as Lautner testified to were within the scope or contemplation of the conspiracy charged in the indictment. The fact that one of the persons alleged to have participated in the Cleveland incident was national treasurer of the Communist Party, and two others were local Party officers, cannot affect the validity of petitioners' conten-

tion. For in the absence of proof that their conduct was authorized or ratified by the Party, it could not be regarded as evidence of the Party's character or purposes (*United States* v. *White*, 322 U. S. 694, 702). And since there was nothing to connect any of the petitioners with said conduct, it follows that the testimony was wholly inadmissible.

The respondent has failed to meet the issues on the jury challenge.

With but a single exception, the respondent makes no attempt to discuss the issues on the jury challenge raised by petitioners. It relies solely upon the general statement that petitioners' "contention is without substance for the reasons set forth in detail in the opinion of the court below * * * as well as in the opinion of Judge Dimock" (G. Br. 51). This reliance on the opinions below leaves unanswered the fundamental conflicts of the opinions with the principles of proper jury selection enunciated by this Court (*Vide* Petition, pp. 86-94).

The sole comment which the respondent makes on any of the issues is embraced in the following:

> "However, we would emphasize that even assuming that improper results were produced by the system of jury administration in the Southern District of New York which was upheld by the court below in *United States* v. *Dennis*, 183 F. 2d 201, the opinions below in the instant case demonstrate that such assumed results were substantially diluted by the time of this trial by the other methods used to obtain prospective jurors since the *Dennis* trial." (G. Br. 51)

But this assertion that "the results were substantially diluted" is not only without support in the opinions below or in the record, it is at complete variance with the facts as acknowledged by both the trial judge and the Court be-

low (A. App. 33, 231-232). For the undisputed fact is that *two out of every three persons who appeared on the basic list at the time the panel for this case was drawn had been selected for jury service during the Dennis period,* i.e., between 1938 and the end of 1948—a period during which the trial judge found, "no attempt [had been made] to reach a cross-section of the population" (A. App. 28).

In view of the foregoing, it would seem clear that petitioners were right when in the petition for certiorari they said (Pet. 85):

> "The trial judge found that throughout the entire ten-year *Dennis* period there was no attempt to achieve a jury list representing a cross-section of those eligible for jury service (A. App. 28). Our recital of the facts shows that during that period, the design of the jury officials was to achieve a jury list which would reflect, not the community, but the upper classes. By placing its imprimatur on a list which is tainted by these methods of selection to the extent of two-thirds of its present members, the Court below has sanctioned methods of jury selection which, if emulated elsewhere—as well they may be in view of the prestige of the Second Circuit—must strike a mortal blow at 'our notions of what a proper jury is [which] have developed in harmony with basic concepts of a democratic society and a representative government' (*Glasser* v. *United States,* 315 U. S. 60, 85). For 'it is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community' (*Smith* v. *Texas,* 311 U. S. 128, 130)."

As to the denial of the motions for continuance and mistrial.

The respondent misconceives petitioners' contention on this question. Petitioners do not contend "that they cannot be tried under the Smith Act as long as there exists a

widespread rejection of their methods and objectives and those of the Soviet Union" (G. Br. 52). Their contention —which the respondent should have had no difficulty in grasping—is that they may not, consistently with the requirements of the Fifth and Sixth Amendments, be tried in an atmosphere of all-pervasive hostility and fear which precludes a fair and impartial determination of their guilt or innocence.

The record demonstrates that the conduct of Government agencies and officials induced an atmosphere of prejudgment, fear and hysteria (Vol. VI, Doc. Nos. 179, 180, 202; Vol. VIII, Doc. Nos. 237, 277; Vol. IX, Doc. No. 238) —an atmosphere which was bound to coerce the judgment of the jurors as effectively as a mob clamoring outside the courtroom.

The release by the Senate Subcommittee on Internal Security, while the trial was in progress, of the pamphlet entitled *Documentary Proof that the Communist Party, U.S.A., Teaches and Advocates Overthrow and Destruction of the United States Government,* is but one of the many acts of Government of which petitioners complain. This was not a matter which involved community rejection of the objectives of the petitioners. This was an act of Government calculated to produce community prejudgment of the guilt of the petitioners. The respondent in its brief relies on the holding of the Court below that the release of the pamphlet was of no significance in view of the fact that the jurors had stated that they had not read it (G. Br. 53). But this holding ignores the vital fact that the release of the pamphlet was accompanied by widespread publicity in the daily press in New York City—publicity which focused attention on the most prejudicial aspects of the pamphlet (*Vide* Petition, pp. 96-97). This publicity could hardly have escaped the attention of the jurors.

And finally the distinction drawn by the respondent between the case at bar and *Delaney* v. *United States*, 199 F. 2d 107 (C. A. 1), is no distinction at all. For it cannot be seriously contended that the release during the trial of a pamphlet which touched directly upon the issues of the case and some of the petitioners is to be distinguished from the publicity in *Delaney*, which occurred several weeks prior to the trial.

As to the misconduct of the jurors.

Petitioners' contentions under this head have not been answered by the respondent. The respondent's emphasis on the circumstances surrounding the letter from Mrs. van Dernoot is misplaced. For these circumstances have no bearing on the question of the misconduct of the jurors. While the charge of juror misconduct was first brought to the attention of the trial judge by Mrs. van Dernoot's letter, the facts subsequently uncovered were not based upon information supplied by Mrs. van Dernoot. These facts included the statement by Mrs. Kane that "at least four of the jurors have held and expressed a judgment on the case adverse to the defendants 'right along'; that they expressed their views and judgment 'strongly' to the other members of the jury continuously; that others were less outspoken, but also expressed similar judgments adverse to the defendants."

CONCLUSION

The writ of certiorari should be issued and the judgment below reversed.

Respectfully submitted,

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Of Counsel,
MARY M. KAUFMAN.

FILED
FEB 4 1955
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 442

ELIZABETH GURLEY FLYNN, PETTIS PERRY, CLAUDIA JONES, ALEXANDER BITTELMAN, ALEXANDER TRACHTENBERG, VICTOR JEREMY JEROME, ALBERT FRANCIS LANNON, LOUIS WEINSTOCK, ARNOLD SAMUEL JOHNSON, BETTY GANNETT, JACOB MINDEL, WILLIAM WOLF WEINSTONE and GEORGE BLAKE CHARNEY,

Petitioners,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR REHEARING

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 442

ELIZABETH GURLEY FLYNN, PETTIS PERRY, CLAUDIA JONES, ALEXANDER BITTELMAN, ALEXANDER TRACHTENBERG, VICTOR JEREMY JEROME, ALBERT FRANCIS LANNON, LOUIS WEINSTOCK, ARNOLD SAMUEL JOHNSON, BETTY GANNETT, JACOB MINDEL, WILLIAM WOLF WEINSTONE and GEORGE BLAKE CHARNEY,

Petitioners,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITION FOR REHEARING

The petitioners pray for a rehearing of the order of the Court entered on January 10, 1955 denying their petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit.

This petition is based on substantial grounds available to petitioners although not previously presented.

I

The trial court dismissed that portion of the indictment which charged petitioners with having participated in the organization of the Communist Party. A question is presented whether the remaining portions of the Smith Act which are invoked by the indictment, as construed and applied, absent the charge of conspiracy to organize the Communist Party, violate the First Amendment. This is a question which was not raised in the petition for certiorari, and is of a substantial nature.

The indictment charges petitioners with having violated the Smith Act by conspiring to engage in two separate and independent forms of conduct, each of them in violation of a separate section of the Smith Act. The first branch of the Smith Act invoked by the indictment is that condemning the teaching and advocacy of certain proscribed doctrines. The second branch of the Smith Act which is invoked by the indictment, and which the trial court dismissed as having been barred by the statute of limitations, makes criminal organizing or helping to organize a society or group of persons who teach or advocate proscribed doctrine.

The conspiracy as charged is the same as that charged in *Dennis* v. *United States,* 341 U. S. 494. Indeed, with certain minor exceptions not material here, the conspiracy as charged is the same as that in all the conspiracy indictments which have thus far been brought under the Smith Act. However, in contrast to the *Dennis* case, there is presented for review here a conspiracy which has a single object, namely, teaching and advocacy, inasmuch as the organization charge in the indictment was dismissed.

The elimination of the organizing branch of the conspiracy raises a very substantial issue which should be reviewed here, both because of its impact upon the instant case and upon the constitutionality of the entire program of Smith Act prosecutions.

It seems to be clear that the running of the statute of limitations will eliminate from all future Smith Act prosecutions, as well as from those which have already been tried, where the indictment was brought subsequent to July, 1948* the organizing branch of the conspiracy. But the *Dennis* conviction was sought to be justified by the Government, and was in fact approved by reviewing courts in large part, because the organizing branch of the conspiracy contributed to the case elements which were deemed to nullify the free speech defense. As we show in Supplement I, at every stage in the Smith Act prosecutions the Government and the courts placed heavy emphasis upon the organizing aspect of the case.

Closely related to the organizing aspect of the *Dennis* case was the leadership role of the defendants. It will be recalled that in that case the defendants were found to be a closely-knit, cohesive, policy-making group which exercised its leadership through a series of moves which were designed to reconstitute the Communist Party in 1945. It was the convention of the Communist Party in 1945 to reorganize the Party which was deemed to be the matrix of the conspiracy. This can be most readily recalled by a summary of the indictment in that case. The *Dennis* indictment charged that the defendants conspired to teach and advocate and to organize the Communist Party. The means through which the objects of the conspiracy alleged in the *Dennis* case were to be carried out were the convening of the National Board of the Communist Political Association for the purpose of adopting a draft resolution dissolving the Communist Political Association and organizing the Communist Party, the convening thereafter of a meeting of the National Committee of the Communist Political Association, and the ultimate convening in July, 1945, of a special national convention of the Communist Political Association.

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* The *Dennis* indictment was brought on July 20, 1948, almost the last day prior to the running of the statute of limitations.

The *Dennis* indictment further alleged as part of the conspiracy that the defendants induced delegates to the July, 1945, convention to dissolve the Communist Political Association and to bring about the organization of the Communist Party as a society advocating illegal doctrine, and caused the convention to adopt a constitution basing the Party upon the principles of Marxism-Leninism.

The *Dennis* indictment further alleged that the defendants in that case conspired to have themselves elected as members of a National Committee and National Board of the Communist Party, and assumed leadership of such Party and responsibility for its policies and activities. Further, the indictment charged that as part of the conspiracy the defendants agreed that they would meet from time to time to formulate, supervise and carry out the policies and activities of the Communist Party, and cause various clubs, districts and state units of the Communist Party to be organized.

In short, the heart of the *Dennis* agreement was to engage in certain organizing activities. And this agreement was formed by a small policy-making group within the Communist Party—but not co-extensive with it—to assume responsibility for the acts of organization charged in the indictment.*

The theory upon which the withholding of constitutional protection was predicated in the *Dennis* case was thus a theory that a uniquely dangerous group had engaged in conduct, namely, organizing the Communist Party (or reorganizing the Communist Political Association) which justified denial of the defendants' claim to constitutional protection. This we document in greater detail in our Supplement.

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* The indictment appears at pages 4-6 of Volume 1 of the *Dennis* record, and at 80 F. Supp. 479.

In contrast to all this, there is before the Court in this case a wholly different constitutional issue. The conduct—organizing—through which the top leadership body of the Communist Party carried out the agreement attributed to it is eliminated from the case. Remaining is the pure issue of whether the Constitution inhibits the punishment of petitioners' speech. And in considering this issue, it must be further borne in mind that it is not only that the objects of the agreement are wholly different here, but that the scope of the agreement itself—its participants—are wholly different. The agreement here, as interpreted by the trial judge, appears to have encompassed a large group of individuals whose testimony was received on the theory that Communist functionaries are *prima facie* co-conspirators.*

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* It can hardly be denied that the touchstone for the admissibility of third party declarations in this case was the Communist Party. This contrasts with the *Dennis* case where Judge HAND ruled that certain declarations of Communist Party functionaries subsequent to 1945 were binding upon the defendants there because all of the defendants had at one time or another been members of the National Committee, which is the executive organ of the Party, elected by the national convention; all had also been members of the National Board, a smaller body in which authority was vested between meetings of the Committee. The Court was obviously impressed in the ruling on the admissibility of third party declarations, with the circumstance that the defendants' unique policy-making role and positions of control made them accountable for declarations in execution of Party purposes.

Moreover, the admissibility of this evidence was justified in the *Dennis* case by the Government itself "on the theory that subordinate Party officials who executed the decisions made by appellants are co-conspirators * * *" (Brief on appeal, p. 370). And for that reason, "there was no error in the admission of evidence relating to statements by subordinate officials of the Party and those working with them in execution of appellants' decisions" (*ibid.*, p. 373). In short, the entire basis for the HAND ruling is that the 1945 reconstitution of the Party was the framework of the conspiracy, that the *Dennis* defendants made the decisions in connection with that charged conspiracy, and that they therefore were responsible for the declarations of those who executed their decisions.

We stress the fact that the conspiracy was enlarged in the instant trial not to complain that the declarations of co-conspirators were improperly admitted (although we believe this to be the case), but rather to make it clear that if, as both the plurality opinion and the concurrence of Mr. Justice JACKSON held, the character of the conspiracy is relevant to a resolution of the constitutional issues, then in this respect, too, a new situation is presented here.* It is one thing to say that a small, cohesive, controlling group is a conspiracy which, because of the character of its composition and functioning, requires the withholding of constitutional protections, and a wholly different thing to say that constitutional protections may be withheld on the theory that there is an agreement at large—inferred from common officership in the Communist Party**—solely to teach and advocate proscribed doctrine. We ask the Court to consider whether the prohibitions of the Constitution do not intervene to prevent this enlargement of the boundaries of *Dennis*.

II

A question is presented whether the refusal of the trial court to dismiss the indictment after it had struck out a major section of the one-count indictment violated the Fifth and Sixth Amendments. This is a question which was not raised in the petition for certiorari, and is of a substantial nature.

The trial court refused to dismiss the indictment as a whole upon petitioners' motion, after striking the organ-

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* "It is the existence of the conspiracy which creates the danger", *Dennis* v. *United States, supra,* at 510. This insistence forms the entire basis of the concurrence of Mr. Justice JACKSON.

** We deal below with the contention that review is required here because the rulings of the trial court conflict with Section 4(f) of the Internal Security Act of 1950, 64 Stat. 992, 50 U. S. C. 783(f).

izing branch of the conspiracy (A. App. 135-136). But, as we have shown, the organizing branch of the conspiracy cannot be deemed to be an incidental aspect of an indictment charging teaching and advocacy. After all, the petitioners were committed to Marxism-Leninism and its teaching long before the indictment was brought. The Communist Party is now over thirty years old and during all the years of its existence it has identified itself with Marxism-Leninism and the teaching of it. And it was not until the Smith Act had been on the books for eight years that an indictment was brought against the *Dennis* defendants. What overcame the seeming inertia of the statute was obviously the reorganization of the Communist Political Association in 1945.*

The organizing charge is thus the gravamen of the offense, the specific act which convinced the Department of Justice to seek an indictment from a grand jury.

As this one-count indictment is written, it plainly makes the organizing branch an integral part of the charge against petitioners. In this case, as well as in the *Dennis* case, the Government relied heavily upon the organizing branch of the indictment to establish the boundaries of the conspiracy and to identify those who allegedly participated in it. Indeed, in this case the Government was forced to rely upon the organizing branch of the conspiracy in an effort to establish a bridge between the petitioners and the defendants in the *Dennis* case with whom the indictment charges they conspired. The elimination of the organizing branch of the conspiracy thus removes from the case not an incidental or casual aspect of the conspiracy, but one which must be deemed to be essential to it. No one can say

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* Indeed, the Government apparently thinks that this event is so important that it has charged it as a crime in all the Smith Act conspiracy indictments since *Dennis*, even though the statute of limitations obviously has run.

that a grand jury, mindful of the protections of the Constitution, would have returned an indictment against speech alone had it known that the important organizing charge would ultimately fall because of the lapse of time.

The trial court, in permitting the indictment to stand, improperly altered and amended the indictment as it left the hands of the grand jury, with the result that petitioners were tried and convicted upon an indictment which was not returned by the grand jury. In thus permitting the indictment to stand, the trial court deprived petitioners of the protection of the Fifth and Sixth Amendments. See *Ex parte Bain,* 121 U. S. 1; *Edgerton* v. *United States,* 143 F. 2d 697 (C. A. 9); *Stewart* v. *United States,* 12 F. 2d 524 (C. A. 9).

We must re-emphasize, finally, that this problem will not die with this case. As we have noted, all Smith Act conspiracy cases breed it because the Government persists in seeking organizing indictments despite the lapse of time, and the impact of the statute of limitations.

III

A question is presented as to the impact of Section 4(f) of the Internal Security Act of 1950 upon the administration of the Smith Act. This is a question which was not raised in the petition for certiorari, and is of a substantial nature.

Subsequent to the decision in the *Dennis* case, but before the trial of the instant case, Congress passed Section 4(f) of the Internal Security Act of 1950, 64 Stat. 992, 50 U. S. C. 783(f), providing in part that "neither the holding of office nor membership in any communist organization by any person shall constitute *per se* a violation of subsection (a) or subsection (c) of this statute or of any other criminal statute." The legislative history of this section dem-

onstrates that it was the congressional purpose to create in Section 4(f) a protection against compulsory self-incrimination and guilt by association arising out of admission as to membership or position in the Communist Party. This was obviously made necessary to make operative the statutory scheme for compulsory registration of members of Communist organizations. The method chosen was to proscribe in prosecutions under all criminal statutes the evidentiary use of an accused's membership or officership in the Party.

One of the prime purposes of the Internal Security Act of 1950 was to require Communist organizations to register and divulge their members. In the event of failure of the organization to register (or to list all of its members), the statute imposes a duty of registration upon such members individually (see Sections 6, 7 and 8, 50 U. S. C. 786, 787, 788). Upon registration a host of disabilities is placed upon the organization and its members (see Sections 5, 6, 10, 11, 50 U. S. C. 784, 785, 789, 790). Early in the history of the legislation before the Senate it was pointed out that the registration requirements might well compel self-incrimination under Section 4(a) of the bill (now 50 U. S. C. A. 783(a)) dealing with conspiracy to establish a foreign dictatorship under foreign control (81st Cong. 2d Sess. Senate Report No. 1358, Letter of John W. Davis, Esq.). The Committee on the Judiciary reported that both Senate bills were drafted to meet the "constitutional objection of John W. Davis." Thus, to answer the objection that the registration requirements raised a problem of self-incrimination under other provisions of Section 4, the committee attempted a remedy which it termed a "specific bar to self-incrimination written into Section 4(f)" (Senate Report 1358, *supra*, 20-21). At that stage of the legislation, however, Section 4(f) applied to no other criminal statute than the proposed statute of which it was a part (Senate Reports No. 1358, *supra*, 17, and 2369, *supra*, 17).

That the registration provisions raised self-incrimination difficulties also with respect to the Smith Act was brought to the attention of the Senate in the minority report on S. 4037 (Senate Report 2369, *supra*, 13) and in the debate (96 Cong. Rec. 14491, 14500). Similarly in the House in the debate on H.R. 9499, it was objected that the bill purported to protect against self-incrimination only under the provision of Section 4 of the bill and failed to provide such protection with respect to the Smith Act (96 Cong. Rec. 13739). Thereupon the author of the bill, who was also the chairman of the committee reporting it, offered an amendment which added the language "or for any alleged violation of any other criminal statute". The amendment was agreed to without further debate or explanation (96 Cong. Rec. 13761). The conference report carried this change, in substance, over into the bill as finally enacted (House Report No. 3112, *supra*, 7).

Simultaneously the framers of the legislation expressed marked solicitude to avoid guilt by association. In its report on S. 2311 the Committee on the Judiciary claimed that the bill satisfied the test laid down by this Court in *Knauer* v. *United States*, 328 U. S. 654, and quoted from the majority opinion the portions reaffirming the rule against proof by imputation and upholding the denaturalization of Knauer as based upon a "pattern of conduct" and "overt acts", rather than membership in an organization. In this respect the committee said that "Section 4 requires individually incriminating evidence of active participation in the activities prohibited" (Senate Report 1358, *supra*, 19, 20).

The same committee, in this connection, appended a memorandum of Donald R. Richberg, Esq. to its report. His language makes plain the purpose to avoid convictions of crime based upon membership alone or together with constitutionally protected conduct:

"It is true that a member of a political party or other loose organization should not be held responsible for personal violations of law by some officer or other member of the organization, in which he did not participate or which he did not help to conceal * * *"

"It will be seen that no individual is made guilty because of mere association with others. He must do something himself which is made unlawful * * *"

"Since such an organization (i.e., a 'Communist organization') is not outlawed it is evident that mere educational propaganda and campaigns for political reforms or to elect candidates to public offices are not made unlawful * * *" (Senate Report 1358, *supra*, 32, 33)

During the debate in the Senate, Senator O'Conor, a proponent and a member of the Committee on the Judiciary, stated that it was the purpose of the bill to make punishable "only overt acts" and to require "substantial evidence that the accused is engaged in an activity which is aimed at the overthrow of our form of government" (96 Cong. Rec. 14257).

It would therefore appear that the framers of the legislation intended not simply to forbid convictions under "any * * * criminal statute" based upon mere membership or officership in the Communist Party, but also to require that such convictions rest upon evidence of actual participation in the activities which the statute proscribes and no other.

The trial court recognized that Section 4(f) of the Internal Security Act imposed limitations of a substantial dimension on the application of the Smith Act. This recognition is reflected both in its rulings on the motion to dismiss and in the charge to the jury. See Reporter's Transcript, 9962, 9775-76 and appendix to brief, p. 146.

The trial court construed Section 4(f) in this manner: It recognized that mere naked or formal officership in the Communist Party was not sufficient to justify a finding by the jury of conspiratorial guilt (A. App. 146). Yet it permitted the jury to consider such officership or membership as a substantial element of such guilt. But under the decisions of this Court nothing less than complete immunity as to all matters, transactions or things which would be touched upon by the admissions made in the registration under the Internal Security Act would render the registration enforceable. See *Counselman* v. *Hitchcock*, 142 U. S. 547; *Brown* v. *Walker*, 161 U. S. 591. And the recent majority decision in *Communist Party* v. *Subversives Activities Control Board*, — App. D. C. — (1954), likewise argues that the constitutionality of the registration provisions are conditioned upon such complete immunity. The trial court's construction of Section 4(f) would thus attribute to it a meaning which would seem to be in conflict with the registration provisions. In addition, the trial court seems to have made a distinction for purposes of Section 4(f) between the fact of being an officer and the things which the individual would normally say or do in the course of carrying out his duties as an officer. But it is indeed a sterile immunity which protects the fact of office alone but permits incrimination on the basis of the duties of the office. Review is required, therefore, in order to clarify the boundaries between these two statutes, both seeking to police the same area. For, as matters now stand, Section 4(f) has been interpreted by the trial court so as to render its purpose nugatory.

The trial court, over objection, admitted the out-of-court declarations of third parties upon the theory that they were the declarations of co-conspirators. The link of these third parties to the petitioners was common membership or officership in the Communist Party. The trial court

rejected the contention that Section 4(f) forbids the use as evidence *aliunde* to qualify the declarations of co-conspirators in cases of this kind that the declarant is a member or officer of the Communist Party. It ruled that the evidence of the acts and declarations of individuals who were shown only to be Communist functionaries and nothing more were admissible against the accused. However, the rule which permits such acts and declarations to be admitted against the accused is not an independent testimonial principle but is simply ancillary to and derived from the substantive law of vicarious liability of co-conspirators. See, for example, 4 Wigmore *Evidence* (3rd Ed.), 130-131; *United States* v. *Pugliese*, 153 F. 2d 497, 500 (C. A. 2). In short, the admissibility of this evidence is predicated upon a *prima facie* finding by the judge that the declarant was linked in conspiratorial guilt to petitioners. This judgment, it seems to us, Section 4(f) prevented the trial court from making. And the legislative history as we have given it above bears us out for it indicates that Congress particularly intended in passing Section 4(f) to restrict the evidentiary use of membership or officership in a Communist organization. This, too, then presents an added reason why the clarifying aid of review is required. Moreover, the problem must be seen in a broader focus. As anti-Communist measures proliferate without sharp congressional focus on their boundaries and interrelationships, it becomes peculiarly important that the Court reconcile and place them in coherent context.

IV

A question is presented as to whether the petitioners may constitutionally be denied a hearing on the issue of clear and present danger. This is a question which was not argued in the petition for certiorari and is of a substantial nature.

The petitioners were denied a hearing on the issue of clear and present danger, although timely application was made for such a hearing (Doc. No. 275, Vol. VIII). Because this issue was not argued in our original petition and because it is enmeshed in a cluster of related issues, we propose to present it for the Court's consideration.

The *Dennis* case does not sanction the denial of a hearing on the issue of clear and present danger. This Court made it clear that to justify a conviction in a Smith Act case, three elements must be found: (1) the gravity of the evil which could result from the speech attacked; (2) the probability that a serious substantive evil would result if such speech were not attacked; and (3) the necessity of restricting the speech in order to make the occurrence of the evil less likely. The shift from the emphasis placed by *Schenck* v. *United States,* 249 U. S. 47, 52, on imminence, did not at all alter the objective character of the standard. Each of the three elements of the present test requires an exploration of the circumstances surrounding the speech before the speech can be restrained. And the Court of Appeals conceded in *Dennis* that "the degree of probability that the utterance will bring about the evil is a question of fact", 183 F. 2d at 215.

The framing of the constitutional issue in Smith Act cases does not merely make underlying constitutional facts relevant; it makes them vital to a conviction. As speech is protected or unprotected according to the company it keeps (or might keep), according to the social or political milieu in which it lives, its environment is an indispensable element in determining the amount of protection it deserves. Therefore, where speech is attacked as criminal, there must be shown before conviction, not only facts establishing the statutory offense, but also the existence of an environment capable of being dangerously influenced by the speech.

If objective circumstances are determinative, then defendants must be granted an opportunity to influence the trier's judgment as to the existence and meaning of those circumstances. In the *Dennis* case this Court recognized that the views of Justices HOLMES and BRANDEIS in the *Gitlow* and *Whitney* cases are now regarded as the law, 341 U. S. at 507. The majority opinion in *Gitlow* v. *New York*, 268 U. S. 652, adopted the view that the mere passage of the statute foreclosed attack on the constitutionality of its application to a particular set of utterances. The dissenting opinion in *Gitlow* insisted upon the right to test the validity of the application of a statute.

In *Whitney* v. *California*, 274 U. S. 357, 379, Justice BRANDEIS' concurrence expressly stated that the defendant could have made the existence of the requisite danger the important issue at her trial, but she had not done so. Justice BRANDEIS noted that "there was evidence on which the court or jury might have found that such danger existed". As the *Whitney* concurrence further pointed out (at 378-379):

> "As a statute, even if not void on its face, may be challenged because invalid as applied, Dahnke-Walker Milling Co. v. Bondurant, 257 U. S. 282, the result of such an enquiry may depend upon the specific facts of the particular case. Whenever the fundamental rights of free speech and assembly are alleged to have been invaded, it remains open to a defendant to present the issue whether there actually did exist at the time a clear danger, whether the danger, if any, was imminent, and whether the evil apprehended was one so substantial as to justify the stringent restriction interposed by the legislature."

Despite the assurances to the contrary in the *Dennis* case, Justice BRANDEIS' concurrence is no longer the law if the trial court's denial of a hearing on the issue of clear and present danger is affirmed.

In *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152-153, the Supreme Court, referring to the *Whitney* concurrence, held that even a commercial regulation would deny due process if it "precluded the disproof in judicial proceedings of all facts which would show or tend to show that a statute depriving the suitor of life, liberty or property had a rational basis". The Court in that case went on to say that while such a showing would have to overcome the presumption of constitutionality attaching to legislation, the scope of that presumption was narrower where the challenged statute affected the personal liberties of individuals.

We do not think that the right to a hearing depends upon whether courts be deemed to be acting as a "surrogate" for the legislature (183 F. 2d at 216) or in some other capacity. In the field of civil liberties, it is particularly true that the legislature cannot be its own judge of when it is appropriate to curtail freedom of speech. Moreover, whether there is a factual justification for creating an exception to the guarantees of the Constitution depends upon circumstances, and the answers to the question whether constitutional protection is appropriate must vary from time to time and place to place. Legislative findings could hardly settle such a question of fact once and for all.

Thus, if in 1940 the legislature had passed the Smith Act and made findings of the kind made by the trial court in support of the constitutionality of the statute's application, there can be no doubt that it would be open to a litigant today to put in issue:

1. The validity of the findings when made. See *Whitney* v. *California, supra,* and the *Carolene Products* case, *supra.*

2. The validity and applicability of the findings insofar as they relate to the speech or conduct of the defendant. See *Whitney* v. *California, supra.*

3. The extent to which the findings had lost applicability by reason of the change in the situation upon which they were predicated. *Chastleton Corp.* v. *Sinclair,* 264 U. S. 543; *Home Building & Loan Ass'n* v. *Blaisdell,* 290 U. S. 398, 442; *Nashville C. & St. L. Ry.* v. *Walters,* 294 U. S. 405, 415.

If a legislature could not prevent a challenge to its findings,* how could a court, putting itself in the legislature's place, immunize such findings from challenge?

In short, under all the traditional rules governing the attack upon statutes and their applicability, the petitioners have a right to a hearing in order to present legislative and adjudicative facts.** Where a restriction upon the exercise of First Amendment rights is involved, we have always been assured that the right to a hearing is greater and not less than in the ordinary commercial case.

Surely the Court cannot be unmindful of the fact that as application is made of statutes in the political area, courts are progressively invited to surrender their judicial functions and to become partners of the legislature, to share the legislature's basically political objectives. But whatever deference the courts may be deemed to owe to the leg-

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* To the effect that legislative declarations of fact must be regarded critically in relation to the question of power lest by such means the legislature attempt to "lift itself by its bootstraps", see 49 Harv. L. R. 634. 4 Wigmore, *Evidence* (3d ed.) 708 points out that a recital of fact in a statute "is not conclusive testimony" and that such recitals are commonly intended merely as explanations of motives and purposes and "could not, without gross injustice, be made evidentially conclusive". He adds that to forbid investigation of the facts in such a case is to "forbid the exercise of an indestructible judicial function" (*ibid.*, at 716).

** On the right to a hearing on and review of facts in constitutional cases on the legislative and adjudicative levels, see Professor Paul Freund's discussions in *Supreme Court and Supreme Law,* edited by Edmond Cahn (1954) at page 47.

islative judgment, it is their final responsibility to give maximum protection to the personal liberties guaranteed by the Constitution. Indeed, how can a court be sure that its finding of clear and present danger has a rational basis, absent a hearing at which the parties have been afforded opportunity to adduce evidence on the issue? Nowhere has the absolutist dogma of legislative omnipotence brought more injury to the judicial process than in the notion that constitutional rights can be foreclosed without an opportunity for a hearing.

Nor can it be said that the device of a hearing is in some manner inappropriate to a presentation of constitutional facts. In a long series of decisions dealing with statutes regulating economic matters, this Court has insisted that an adequate foundation, based upon facts or expert testimony, must appear in the record before constitutional issues are decided. See *Smith* v. *Texas,* 233 U. S. 630, 633; *Bunting* v. *Oregon,* 243 U. S. 426, 438; *Chastleton* v. *Sinclair,* 264 U. S. 543, 549; *Weaver* v. *Palmer Bros. Co.,* 270 U. S. 402, 410; *Borden's Farm Products Co.* v. *Baldwin,* 293 U. S. 194, 209; *Nashville C. & St. L. Ry.* v. *Walters,* 294 U. S. 405, 414-416; *Polk Co.* v. *Glover,* 305 U. S. 5, 9.

It cannot be said that petitioners suffered less injury as a result of the denial by the trial court of a hearing on this issue than would be suffered by any defendant in a criminal case denied an opportunity to adduce evidence concerning an essential element of his offense. In this case, a hearing could have corrected many of the trial court's highly inaccurate assumptions. In such a hearing, petitioners would have pointed out that the clear and present danger conclusions in *Dennis* could not be used—as they were—to deprive their utterances of constitutional protection because their roles could not be equated to those of the *Dennis* defendants, because the content of the conspiracy of which they were convicted was wholly different in that it lacked the element of organization, and because the

passage of time had de-vitalized many of this Court's conclusions with respect to the world situation.

Against the background of the evidence in the case, petitioners would have further adduced in such a hearing extrinsic evidence which would answer the following basic questions of fact:

1. What is the probability that the alleged advocacy of force and violence by these petitioners will bring about the overthrow or attempted overthrow of the United States Government?

2. What are the social costs, in terms of the effect upon the democratic liberties of the American people, of prohibiting advocacy of revolutionary change through a program of prosecutions under the Smith Act?

3. To what extent does the prosecution of these petitioners for alleged advocacy of force and violence minimize the possibility of overthrow of or attempted overthrow of the United States Government?

4. Are there effective alternative methods of eliminating the possibility of overthrow or attempted overthrow of the United States Government?*

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* Question 1 is relevant to a determination of the "gravity of the evil". It is also relevant in applying the phrase "discounted by its improbability". Questions 2, 3 and 4 seem to be plainly implied in the phrase "*justifies* such invasion of free speech as is *necessary* to avoid the danger". Were these elements to be omitted from consideration, then the constitutional test would be simply that, if the danger is great and probable, *any methods at all* can be constitutionally employed to meet it. This cannot be the law. Support for the relevancy of Question 4 is found in such cases as *Thornhill* v. *Alabama*, 310 U. S. 88, 95-96; *Schneider* v. *State*, 308 U. S. 147 and *Martin* v. *Struthers*, 319 U. S. 141, which insist that the legislature must first exhaust alternative and non-abridging methods of curtailing the evil and averting the threatened danger. As Professor Paul H. Freund has pointed out in *On Understanding the Supreme Court* (1950) 27, the clear and present danger test must take into account "the availability of more moderate controls than those which the state has imposed".

Petitioners in such a hearing would have presented extrinsic evidence demonstrating that there are no objective conditions in the world situation from which a realistic inference could be drawn that petitioners' teachings threaten our security. It would have dealt in detail with the strength of our domestic institutions and shown that they command the loyalties of our people.* It would have developed factual data concerning the extent of our defenses against subversion. It would have pointed out that any genuine threats to our security could be easily met by a veritable arsenal of legislation.

Such a hearing would have contrasted the poor security return from the application of the Smith Act to petitioners with the profligate expenditure of First Amendment values which it entails. It would have demonstrated that while we proclaim in the chambers of international tribunals our dedication to freedom and fill the airwaves of the world with the boast that we are a free people, we are unfree as never before. Petitioners would have introduced oral and documentary testimony from experts who have studied our national life and are intimate with world opinion, to establish that our traditions of freedom have been compromised at home and our reputation undermined abroad by the growing repression in this country. Such testimony would have established that there is an atmosphere of deepening fear which has been generated in this country by applications of the Smith Act of the kind in-

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* The heart of any analysis of whether there is a nexus between speech and dangerous action is a determination that the utterances involved so interact with *domestic* political and economic conditions as to create a danger of a substantive evil. Certainly the facts with respect to such conditions supply the surest and most reliable index to whether or not the words spoken were "used in such circumstances and are of such a nature" as to create a clear and present danger, *Schenck* v. *United States*, 249 U. S. 47, 52. Yet, curiously enough, in this case the trial court wholly ignored this aspect of the clear and present danger test.

volved here. Such testimony would have developed the fact that prosecutions like this sterilize the exercise of free expression by non-Communists who fear that they may be tarred with the same brush; that such prosecutions cripple group action and create fear of joining any organization dedicated to economic or political change.

A hearing on this issue would further have developed the fact that such prosecutions imperil our liberties by creating a governmental apparatus for the punishment of political expression, by encouraging the accumulation of secret dossiers on political dissenters, by creating a corps of political spies and informers who are hired by the Government to betray its citizens.

Finally, such a hearing would have developed the fact that prosecutions such as these have historically, both here and abroad, been the mark of repressive and anti-democratic regimes, that they are exploited by demagogues so as to form a barrier to the rational solution of the momentous problems which confront our time.

Untouched by the controversy as to the permissible scope of constitutional freedoms is the recognition that it is the function of the courts to interpret restraints upon freedom with economy and fluidity so as to insure the maximum protection of protected freedoms and the relaxation of restrictions upon such freedoms at the earliest possible moment. As the *Dennis* case was interpreted below, this basic function is frustrated because petitioners were denied the opportunity to influence the trial court's judgment as to the justifying need for such restrictions. But in the final analysis, the function of the courts is to do justice under a system of due process of law. The denial of the right to litigate an essential element of the offense charged was in conflict with this primary responsibility of the judicial system.

V

A question is presented as to whether the trial court improperly resolved the issue of clear and present danger on the basis of judicial notice. This is a question which was not presented in the petition for certiorari and is of a substantial nature.

In denying petitioners' motion for a hearing on the question of clear and present danger, the trial court stated:

> "I consider that I have sufficiently before me in the record and in the material of which I am entitled to take judicial notice to make the determination of clear and present danger, but for your benefit I will be glad to advise you what the facts are of which I am taking a judicial notice." (Tr. 13672)

The Court then read a statement in which certain clamied propositions were recited as "facts" of which the Court took judicial notice. But judicial notice cannot serve as a "pretext for dispensing with a trial." For "notice, even when taken, has no other effect than to relieve one of the parties to a controversy of the burden of resorting to the usual forms of evidence. 'It does not mean that the opponent is prevented from disputing the matter by evidence if he believe it disputable.' " *Ohio Bell Telephone Co.* v. *Public Utilities Commission of Ohio.* 301 U. S. 292, 301-302.

As Wigmore points out (9 *Evidence,* 3d Ed., 535):

> "That a matter is judicially noticed means merely that it is taken as true without the offering of evidence by the party who should ordinarily have done so. This is because the court assumes that the matter is so notorious that it will not be disputed. But the opponent is not prevented from disputing the matter by evidence, if he believes it disputable. It is true that

occasionally a court is found declaring a thing judicially noticed and at the same time refusing to listen to evidence to the contrary; but usually this is in truth laying down a new rule of substantive law by declaring certain facts immaterial; whenever a court forbids the production of evidence, it removes the subject from the realm of the law of evidence properly so called."

Moreover, the controversial matters of opinion which form the basis of the trial court's conclusions are not properly subject to judicial notice. And even if they were not excluded from permissible notice for that reason, they still could not be noticed, for the "external political facts of international affairs" are not a subject of judicial notice. *Ibid.*, 562.

At the very minimum, the appellants were entitled to an opportunity to participate in a proceeding to contest the indisputability of the facts of which the trial court took judicial notice. In an analysis of the very problem in focus here, namely, the manner in which the constitutional standard of the *Dennis* case is to be administered, it has been pointed out:

> "To assure that the facts of which it proposes to take notice are properly subject to notice, the court should give the defendant an opportunity to controvert these facts, although reserving to itself the final determination as to whether they are genuinely disputable. Disregard of the disputed facts may still leave an undisputed residue adequate to fill in the background of inherent probability. If not, there would remain no alternative but to take testimony on the issue." *

See also *Model Code of Evidence*, Rules 804-806.

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* Richardson, *Freedom of Expression and the Function of Courts*, 65 Harvard L. R. 30-31.

VI

A question is presented concerning as of what time must a clear and present danger be shown to exist in order to justify withholding constitutional protections from petitioners. This is a question which was not raised in the petition for certiorari and is of a substantial nature.

Let us assume that the trial court (a) properly found the existence of a clear and present danger, (b) properly denied petitioners a hearing, and (c) properly took judicial notice of the "facts" allegedly giving rise to a clear and present danger. There remains the question urgently calling for review here whether the supervention of new facts in the course of the reviewing process requires a re-evaluation of the issues in the light of those facts.

In the *Dennis* case, the Court will recall, Judge MEDINA found the existence of a clear and present danger, but in no way indicated the reasons or bases for his findings. Judge HAND made a clear and present danger finding *de novo*, apparently in discharge of an independent judicial responsibility, and adduced certain reasons drawn from the political state of the world in support of his finding. The matters to which Judge HAND referred were dated as of the summer of 1948 when the indictment was brought. In the same way, Chief Justice VINSON's plurality opinion referred to certain facts which, it was alleged, justified the constitutional application of the statute (341 U. S. 510-511) but did not refer or deal with the supervening changes in the political situation between the summer of 1948 when the indictment was brought and June 4, 1951 when this Court's opinion was handed down.

The petitioners in the *Dennis* case did not urge before this Court that there was no clear and present danger, as there defined, either at the time that the indictment was brought or when the case was presented to the Court.

In this case the indictment was brought in June, 1951. The decision of the trial court as to the existence of a clear and present danger adopted in large part the findings of Judge HAND. The decision of the lower court on October 14, 1954 merely approved the finding of the trial court without taking into account the tremendous change in political circumstances which had intervened between June, 1951 and the date of the decision. In approving this finding it pointed out that the factors which had contributed to Judge DIMOCK's decision as well as the procedures he followed "were the very ones considered by this Court in upholding the trial court's finding of 'clear and present danger' in 1948 in *Dennis*, brought down to date" (App. 1944).

But surely the fact that Judge DIMOCK largely adopted the findings considered by the court below and this Court in the *Dennis* case cannot exhaust a reviewing court's responsibilities. Assuming that the same factors which contributed to the existence of a clear and present danger in *Dennis* persisted when this case was brought to trial and that a re-adoption of them was warranted—which we strongly question and will develop at length in our petition for rehearing—the reviewing court was required itself to determine whether at the time the case was brought for review there were then in existence factors which justified the continuing denial of constitutional protections. Nothing seems to us to demonstrate this more clearly than the very next sentence in the lower court's opinion, which states that "If the danger was clear and present in 1948, it can hardly be thought to have been less in 1951 when the Korean conflict was raging and our relations to the Communist world had moved from cold to hot war." (App. 1945) The fact remains that at the time the opinion was written the Korean conflict had ended and our relations with the Communist world had decidedly im-

proved. Was the lower court not bound to take this into account in determining whether petitioners' constitutional rights had been invaded?

As we have already noted, the function of a court in a constitutional case is to find wherever possible reasons for protecting speech and not to permit the dead hand of the past to throttle it. As this Court has noted in the *Dennis* case, both in the plurality opinion of Chief Justice VINSON and in the concurring opinion of Associate Justice FRANKFURTER, a judgment of clear and present danger is basically a rough prophecy: If speech is unrestrained dangerous consequences to the national security may ensue. But is a court required to restrict the exercise of speech when the passage of time has robbed the prophecy of its validity?

The problem involved here must be distinguished from that presented by application of the law to a conventional crime where punishment serves the end of deterrence. The only justifiable end here is the preservation of some important national interest—not the punishment of individuals for speech which might create dangers already neutralized by time. Just as a court of equity must shape its decree in the light of the facts current at the time of its final action, so a reviewing court in determining the propriety of an invasion of free speech must shape its determination in the light of the political climate obtaining at the last possible moment when the issue is before it for determination. Surely this Court would not hesitate to strike down a statute valid at its enactment and initial challenge if a change in the facts upon which it was predicated supervened in the course of the reviewing process. Compare *Block* v. *Hirsch*, 256 U. S. 135; *Chastleton Corp.* v. *Sinclair*, 264 U. S. 543; *Nashville C. & St. L. Ry.* v. *Walters*, 294 U. S. 405, 415. We believe that in this case involving the denial of constitutional protection in the area of the

First Amendment it is necessary for this Court itself to consider whether as of January, 1955 the facts referred to by Judge DIMOCK—relying in part upon conditions allegedly existing in 1948—still have vitality to deprive petitioners of constitutional protections. Unless this Court recognizes the necessity for weighing petitioners' right to speech against current political realities rather than ghostly phantasms, there is a serious danger that petitioners—and all other Communists tried under the Smith Act—will be convicted not because of the destructive impact of their speech upon some presently existing national interest, but because they are Communists. If fears for our security are to result in a narrowing of our liberties, then those fears should be predicated upon the present and not frozen into our constitutional system by perpetuating a crisis which time has softened.

VII

A question is presented as to whether the evidence upon which the Government's case rests was procured through a violation of the First, Fourth and Fifth Amendments of the Constitution, *Gouled* v. *United States,* 255 U. S. 298. The evidence consisted of (a) testimony obtained through the use of government agents whose presence in Communist Party meetings can only be described as fraudulent and hence constituted a trespass, and (b) of testimony of ex-Communists who have become professional testifiers.

This contention was not involved in the *Dennis* case. It should be disposed of now. The integrity of the administration of justice requires it. The government violated the rights of freedom of assembly and association of petitioners when its informers, fraudulently and by stealth, obtained admission to their private meetings. The violation would have been clear to all had uniformed police forced their way into the meetings. *Local 309* v. *Gates,* 75 F. Supp.

620, 624 (D. C. Ind.). Is it any the less clear because admission was obtained by police agents posing as members of the Party? Can the F.B.I. avoid the consequences of the law which protects free association by using fraud as a substitute for force?

If evidence obtained in violation of a federal statute may not be received in a federal court,* it would seem self-evident that "a conviction in the federal courts, the foundation of which is evidence obtained in disregard of liberties deemed fundamental by the Constitution, cannot stand," *McNabb* v. *United States,* 318 U. S. 332, 339. See also *Weeks* v. *United States,* 232 U. S. 383; *Boyd* v. *United States,* 116 U. S. 616; *Byars* v. *United States,* 273 U. S. 28.

Finally, petitioners fruitlessly requested the trial court that the jury be instructed that the testimony of the informers be scrutinized with great care. Compare *Fletcher* v. *United States,* 158 F. 2d 321 (App. D. C.). If informers are to become the standard witness in political trials, then this Court must determine authoritatively whether the administration of justice requires that their testimony be evaluated with special care.

The extent to which the use of the paid informers has compromised the administration of justice may be measured

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* This Court has on innumerable occasions held that evidence illegally secured is not admissible in the federal courts. This rule has been applied in a variety of cases. Thus, testimony secured through the violation of Section 605 of the Communications Act of 1934 (47 U. S. C. 605) is inadmissible. *Nardone* v. *United States,* 302 U. S. 379. A confession obtained in violation of the Prompt Production Statute (18 U. S. C. 595) is equally inadmissible. *McNabb* v. *United States,* 318 U. S. 332, rehearing denied 319 U. S. 784. Not only is evidence illegally obtained inadmissible, but evidence obtained through the use of clues supplied by illegally procured evidence is likewise inadmissible. *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385. In the words of the Supreme Court, a "fruit of the poisonous tree cannot be used to secure a conviction." *Nardone* v. *United States,* 308 U. S. 338, 341.

by the admissions, made since the filing of the petition for certiorari herein, by Harvey M. Matusow. This individual, one of the key witnesses in this case, has recently admitted in a sworn affidavit that he gave false testimony at the suggestion of the prosecution and with the knowledge of the prosecution that said testimony was false. We attach to this petition as Supplement II, a motion dealing with this matter filed with the trial court on January 31, 1955. As is obvious, this is the first time this matter could have been called to the attention of the Court.

Matusow's admitted perjury is but one manifestation of a deep seated threat to the administration of justice which urgently calls for the correction of this Court.

CONCLUSION

Certiorari should be granted.

Respectfully submitted,

HARRY SACHER,
Attorney for Petitioners.

Of Counsel:
HARRY SACHER,
MARY M. KAUFMAN,
DONNER, KINOY & PERLIN,
By FRANK DONNER,
ARTHUR KINOY,
MARSHALL PERLIN.

Certificate of Counsel

I certify that the within and foregoing Petition for Rehearing is presented in good faith and not for delay, and that it is restricted to substantial grounds available to petitioners although not previously presented.

HARRY SACHER,
Of Counsel for Petitioners.

[SUPPLEMENTS I AND II FOLLOW]

SUPPLEMENT I

The Role and Organizing Activities of the Defendants in the Dennis Case

A. Statements by the Supreme Court

341 U. S. at 498

"But the Court of Appeals held that the record supports the following broad conclusions: By virtue of their control over the political apparatus of the Communist Political Association, petitioners were able to transform that organization into the Communist Party * * * "

341 U. S. at 509

"If Government is aware that a group aiming at its overthrow is attempting to indoctrinate its members and to commit them to a course whereby they will strike when the leaders feel the circumstances permit, action by the Government is required."

341 U. S. at 510, 511

"The formation by petitioners of such a highly organized conspiracy, with rigidly disciplined members subject to call when the leaders, these petitioners, felt that the time had come for action, coupled with the inflammable nature of world conditions, similar uprisings in other countries, and the touch-and-go nature of our relations with countries with whom petitioners were in the very least ideologically attuned, convince us that their convictions were justified on this score."

B. Statements by the Court of Appeals

183 F. 2d at 212, 230

"The American Communist Party, of which the defendants are the controlling spirits, is a highly articu-

lated, well contrived, far spread organization, numbering thousands of adherents, rigidly and ruthlessly disciplined, many of whom are infused with a passionate Utopian faith that is to redeem mankind. * * *

"All the defendants had at one time or another been members of the National Committee, which is the executive organ of the Party elected by the National Convention; all had also been members of the National Board, a smaller body in which authority was vested between meetings of the Committee."

C. Excerpts from the Government's Court of Appeals Brief in the Dennis case Emphasizing the Controlling Role of the Dennis Defendants as a Group and Their Organizing Activities

Page 15

"Under the leadership of appellants, the Communist Party was recreated in the tradition of Lenin and Stalin."

Page 18

"The Board convened a meeting of the National Committee, called for discussion of the Resolution condemning Browder's class peace and directed that—

> During the entire period of the discussion, the policy and practical mass work of the Association shall be governed by the Resolution of the National Board."

Page 20

"The National Committee called a special convention to convene July 26, 1945, and it established a Secretariat comprised of Foster and appellants Dennis and Williamson empowered with full authority to act as the authoritative spokesman for the Association and to act for it.

"The National Committee also created a committee, including appellants Dennis, Thompson and Williamson, to make a 'political examination' of the leading officials of the Association and to propose recommendations for 'refreshing' the national leadership."

Page 28

"Between sessions of the National Committee, the National Board is charged with the responsibility of carrying out the decisions and work of the National Committee and is the leading authority of the Party (9 R. 6746). The National Board is elected by the National Committee and is responsible for all its actions to the National Committee (Ex. 26, p. 18, Art. 7, Sec. 7, 19 R. 14802; 5 R. 3674)."

Page 29

"The policy decisions of the National Committee and of the National Board, which acts as the executive arm of the National Committee (5 R. 3565), are transmitted to the various local organs of the Party and must be carried out regardless of whether the local officials agree with them (10 R. 7689; 11 R. 8321)."

Page 89

"The close relationship between the National Education Commission and the National Board and National Committee is undisputed. The Commission was established by the National Committee and appellant Stachel, a member of the National Board and National Committee, was its director for two years immediately preceding the return of the indictment. The Education Director is required to report periodically to the National Board and the National Committee on the work of the National Education Department (5 R. 3873; 9 R. 6886; 10 R. 8131), and the main policy of what is taught in Party schools is fixed by the National Board (11 R. 8441; 15 R. 11913)."

Page 123

"Appellants are the central figures who controlled the Party in the United States during the period covered by the indictment. During the entire period, they were members of its National Committee, and all served on the National Board, some for the entire three-year period and others for lesser periods in excess of one year.[95]

"Indisputably, they were the top policy making and administrative officials of the Party. By virtue of the Leninist principle of democratic centralism, they maintained an iron discipline over all members and officials of the Party, which insured the execution of their every command and which foreclosed Party activities inconsistent with the line which they laid out. As appellant Green testified * * * when the National Board decides on a policy, the subordinate organs of the Party execute that policy regardless of whether they agree with it. And the testimony of appellants Davis and Winston * * * emphasizes that this is as true with respect to the Party schools, as it is in all other aspects of Party activity."

Page 240

"These appellants are the organizers and leaders of the Communist Party and they, above all other persons in the United States, threaten serious injury to the national interests protected by the Smith Act."

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95. Assuming, *arguendo*, that some of the appellants became members of the conspiracy only when they joined the National Board, that would not aid them. For they adopted and furthered the conspiracy and may properly be treated as co-conspirators. (Footnote in original.)

SUPPLEMENT II

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK
C 136-7

UNITED STATES OF AMERICA

v.

ELIZABETH GURLEY FLYNN, PETTIS PERRY, CLAUDIA JONES, ALEXANDER BITTELMAN, ALEXANDER TRACHTENBERG, VICTOR JEREMY JEROME, ALBERT FRANCIS LANNON, LOUIS WEINSTOCK. ARNOLD SAMUEL JOHNSON, BETTY GANNETT, JACOB MINDEL, WILLIAM WOLF WEINSTONE and GEORGE BLAKE CHARNEY,

Defendants.

Upon the annexed affidavits of Harvey M. Matusow and Mary M. Kaufman and upon the transcript of the evidence and exhibits and upon all of the proceedings in the above entitled action, let the United States Attorney for the Southern District of New York show cause before me or one of the Judges of this Court, sitting at a Term thereof, to be held at the United States Courthouse, Foley Square, in the Borough of Manhattan, City and State of New York, in Room 318 thereof, on the 2nd day of February, 1955, at 10:30 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, why a new trial, pursuant to Rule 33 of the Federal Rules of Criminal Procedure, should not be granted on the ground that a new trial to the defendants is required in the interest of justice and on the ground of the newly discovered evidence set forth in the annexed affidavit of Harvey M. Matusow.

Sufficient reason appearing therefor, let service of a copy of this order to show cause and the annexed motion and affidavits, upon the United States Attorney for the Southern District of New York, on the 1st day of February, 1955, be deemed good and sufficient service.

Date: New York, New York
January 31, 1955.

/s/ E. J. DIMOCK,
U. S. D. J.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

C 136-7

UNITED STATES OF AMERICA

v.

ELIZABETH GURLEY FLYNN, PETTIS PERRY, CLAUDIA JONES, ALEXANDER BITTELMAN, ALEXANDER TRACHTENBERG, VICTOR JEREMY JEROME, ALBERT FRANCIS LANNON, LOUIS WEINSTOCK. ARNOLD SAMUEL JOHNSON, BETTY GANNETT, JACOB MINDEL, WILLIAM WOLF WEINSTONE and GEORGE BLAKE CHARNEY,

Defendants.

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

MARY M. KAUFMAN, being duly sworn, deposes and says:

1. She is the attorney for the defendants in the above entitled proceeding and is fully familiar with all the facts in connection therewith.

2. This affidavit is submitted in support of a motion for a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure on the ground that a new trial to the defendants is required in the interest of justice and on the ground of newly discovered evidence set forth in the annexed affidavit of Harvey M. Matusow.

3. The defendants were indicted on June 20, 1951. The indictment charges in a single count a conspiracy under

Section 3 of the Alien Registration Act of 1940, commonly known as the Smith Act (54 Stat. 671; 18 U.S.C. (1946 ed.) Sec. 11; 18 U.S.C. (1948 ed.) Sec. 371) to engage in conduct prohibited by Section 2 of the Act (18 U.S.C. (1946 ed.) Sec. 10; 18 U.S.C. (1948 ed.) Sec. 2385), to wit: "(1) Unlawfully, wilfully, and knowingly, to advocate and teach the duty and necessity of overthrowing and destroying the Government of the United States by force and violence; and (2) unlawfully, wilfully, and knowingly, to organize and help to organize as the Communist Party of the United States of America a society, group and assembly of persons who teach and advocate the overthrow and destruction of the Government of the United States by force and violence."

4. The trial commenced on March 31, 1952, and the issues were tried on the merits before Hon. EDWARD J. DIMOCK from April 24, 1952, through January 21, 1953. On September 22, 1952, after the Government had rested, the defendants moved for a judgment of acquittal. On September 23, 1952, said motion was granted in respect to defendants Simon William Gerson and Isadore Begun, both of whom were indicted and tried with the above named defendants, and denied in respect to all of the other defendants on trial. On January 21, 1953, each of the remaining defendants was found guilty. All of the defendants were sentenced on February 3, 1953, and judgments were filed and commitments issued on the same day.

5. The defendants duly appealed from the judgment of conviction herein to the United States Court of Appeals for the Second Circuit and that Court rendered a judgment on October 14, 1954, affirming the judgment of conviction. Thereafter the defendants duly filed a petition in the Supreme Court of the United States for a writ of certiorari to the United States Court of Appeals for the Second Circuit to review the judgment of the Court of Appeals.

The Supreme Court denied said petition on January 10, 1955. The order of the Supreme Court denying said petition for certiorari was received by the Clerk of the United States Court of Appeals for the Second Circuit on January 18, 1955.

6. In the annexed affidavit of Harvey M. Matusow, a witness for the Government in the above entitled proceeding, Mr. Matusow states that testimony he gave in the course of the trial against the defendants herein was either false or not entirely true and was known to be either false or not entirely true. In said affidavit Mr. Matusow sets forth with specificness matters concerning which he falsely testified with knowledge that said testimony was false. He further states in said affidavit that certain of the testimony was falsely given at the suggestion of the prosecution and with the knowledge of the prosecution that said testimony was false.

7. The false testimony aforesaid was material to ultimate issues posed by the indictment and was of such an inflammatory and outstanding quality as to justify the conclusion that without said testimony or with knowledge that said testimony was false, the jury would probably have acquitted.

8. The evidence contained in the affidavit was of course not available to the defendants herein at the time of their trial but has been newly discovered since then. It was not until a time subsequent to January 1, 1955, that the defendants herein learned that Mr. Matusow was willing to make an affidavit admitting the falsity of his testimony in the respects set forth in the affidavit hereto annexed. Defendants and their counsel have been diligent in obtaining the said evidence and this motion is filed with the

objective of carrying forward the due and proper administration of justice in this Court and to have justice under the law done to each and every defendant herein.

9. The defendants request the Court to hold a hearing on the within motion and to permit the presentation of evidence and argument thereon.

10. The defendants offer to call Mr. Matusow as a witness and offer to prove that if he were permitted to testify he would testify to the effect of the matters set forth in the annexed affidavit of Mr. Matusow.

11. An order to show cause is being applied for to bring this motion on for a hearing because the time within which said motion may be made, pursuant to Rule 33 of the Federal Rules of Criminal Procedure, may expire on February 3, 1955; hence sufficient time does not exist for the service of regular notice of motion.

12. No previous application has been made for the relief sought herein.

WHEREFORE, deponent respectfully prays for an order to show cause why a new trial of the defendants herein should not be granted, and for such other and further relief as to the Court may seem just and proper in the premises.

/s/ MARY M. KAUFMAN
Mary M. Kaufman

Sworn to before me this
31st day of January, 1955.
ROBERT Z. LEWIS
Notary Public, State of New York
No. 31-7537400
Qualified in New York County
Commission Expires March 30, 1956

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

C 136-7

UNITED STATES OF AMERICA,

v.

ELIZABETH GURLEY FLYNN, *et al.*,

Defendants.

STATE OF NEW YORK,
COUNTY OF NEW YORK, } ss.:

HARVEY M. MATUSOW, being duly sworn, deposes and says:

1. I make this affidavit in support of the motion by the defendants for a new trial and to do what I can to remedy the harm I have done to the defendants in the case of *United States of America* v. *Elizabeth Gurley Flynn, et al.*

2. I appeared as a witness for the Government against the defendants in the course of the trial in the above-entitled case in this Court in July, 1952, on an indictment charging the defendants with conspiring to violate the teaching and advocacy and organizing sections of the Smith Act.

3. The testimony I gave in the course of the trial appears in the typewritten transcript of the record at page 6565 and thereafter.

4. The matters I testified to were either false or not entirely true and were known to me to be either false or not entirely true, at the time I so testified, in that:

A. On July 22, 1952, I testified that defendant Perry addressed a meeting held in a restaurant on University Place in the City of New York in December, 1948. I further testified that:

> "Mr. Perry spoke about the question of building socialism. He said that the building of socialism went hand-in-hand with the setting up and establishing of a Negro nation in the black belt of the United States, and the freeing of the Negro people and the Negro liberation movement, that the South in the United States—there were some States such as Mississippi where the Negro people constituted a majority, and that a Negro nation would have to be set up, would be set up in the black belt. He referred to the book, Marxism and the National Question, and the basic principles for definition of what is a nation, and he stated that the Negro people in the United States constitute a nation, and that this nation could not be set up unless socialism were to come to power in the United States and that the bourgeoisie would not sit back and let it come to power peacefully, and therefore the working class led by the Communist Party would have to forcibly overthrow this bourgeoisie to set up the Negro nation while establishing socialism." (Tr. 6628-29)

The foregoing testimony was true only in so far as it states the fact that Defendant Perry addressed the meeting I described on the date indicated, but I gave false testimony when I testified that defendant Perry said that the building of socialism went hand in hand with the establishment of a Negro nation in the Black Belt of the United

States and that this nation could not be set up unless socialism were to come to power in the United States, that the bourgeoisie would not sit back and let it come to power peacefully and therefore the working class, led by the Communist Party, would have to forcefully overthrow the bourgeoisie in order to set up the Negro nation while establishing socialism.

At no time did I, either at this meeting or elsewhere, hear defendant Perry make the foregoing statement or refer to the overthrow of the United States Government by force and violence or by any other means.

B. I further testified on July 22, 1952, that in the fall of 1949 defendant Trachtenberg had a conversation with me at the Workers' Book Shop, where I was employed, concerning a book entitled "Law of the Soviet State", by Andre Vishinski (Tr. 6645-6646). I further testified that defendant Trachtenberg said that

> "• • • the concepts created here by Mr. Vishinski on a new form of socialist law were diametrically opposed to the English law, and that the Party should be familiar with this new concept of Socialist law, and that if the book were published at a lower price than $15, it would be very useful in the Party apparatus and educational set-up." (Tr. 6646)

I also testified that

> "Mr. Trachtenberg said that the book contained the first comprehensive report of the Soviet concept of law and the Marxist Leninist concept of law.
>
> "He went on further to say that in talking about the book, the law of the Soviet State, that the question of capitalism and socialism here, or the creating of a socialist society and eliminating class antagonisms, how that was to be accomplished through the establishment of socialism, how the diametrically opposed classes could be eliminated—were found in that book." (Tr. 6653)

My testimony regarding defendant Trachtenberg's remarks about the book, "Law of the Soviet State", was true in respect to the fact that defendant Trachtenberg casually mentioned the book as one of many which were being sold in the Jefferson School Book Shop. The extent of his remarks was solely that of inquiry in relation to the sales of the book in the same general conversation in which the sales of other books in the Book Shop was discussed.

In all other respects, my testimony concerning this conversation with defendant Trachtenberg is false. At no time in the course of the conversation did defendant Trachtenberg make the statements that I attributed to him in the foregoing quoted portions of the testimony. At no time did defendant Trachtenberg refer to the book in relation to the concept of revolution or overthrow of the Government. At no time during the many occasions that I met with and talked with defendant Trachtenberg did he indicate that he advocated the overthrow of the United States Government by force or violence or any other means.

The question of my testimony concerning the book "The Law of the Soviet State", by Andrei Vishinsky, was first raised by Roy Cohn, Assistant United States Attorney, who worked with me in preparing my testimony. The conversation in which the subject was first discussed with Cohn took place in a car driven by a Special Agent of the F.B.I. United States Attorneys David Marks, Roy Cohn and J. J. McCarthy, a Special Agent of the F.B.I., and two other individuals were seated in the car at the time. Mr. Cohn mentioned the book by Vishinsky. Cohn said that because of a section of the book it would be important to connect the book with the defendants. He said that the United States Attorney had attempted to introduce this book in the Dennis case, but was unable to lay the necessary foundation. He then asked me if I had ever discussed the

book with any of the defendants. I told him that I had discussed it with Trachtenberg. Cohn asked me for the substance of that conversation, and I informed him that Trachtenberg had inquired about the sales of the book in a conversation in which he made similar inquiry concerning the sales of other books carried in the book shop.

A subsequent conversation concerning the book occurred in Roy Cohn's office. He showed me the book entitled "The Law of the Soviet State", and asked me whether this was the book which Trachtenberg had discussed with me. He then asked me for further details concerning this conversation with Trachtenberg, and I informed him that Trachtenberg had discussed the price of the book. Cohn stated that this would not be sufficient to lay the necessary foundation for its introduction in evidence. Cohn pointed to a passage in the book and told me that that passage was important in proving the Government's case. He then asked me if I had discussed anything with Trachtenberg which would tie him with this passage, and I said, "No", I had not. Nevertheless, thereafter, in several sessions with Cohn, we developed the answer which I gave in my testimony, tying Trachtenberg to that passage. We both knew that Trachtenberg had never made the statements which I attributed to him in my testimony.

C. I testified that in December, 1948, I attended a meeting at the Hank Forbes Auditorium of the Communist Party Headquarters at 35 East 12th Street, New York City, at which Arnold Johnson spoke (Tr. 6626-27), and I testified that defendant Johnson said:

> "• • • that it was important for the Communist Youth Movement to build a new Marxist-Leninist Youth Group that would or could leave the white collar jobs and get out into basic industry in the tradition of the Young Communist League. He said that the New York organization, the Youth Organization of the Commu-

nist Party needed building. We had a trained cadre, and we had to train them in New York and get them out into the basic industries so that we could recruit young workers and get them on the side of the Communist Party. We had to get them into the trade unions in the midwest, in basic industries, and we had to recruit in there, and in the event of any war with the Soviet Union we would then have people on our side." (Tr. 6627)

It is true that defendant Johnson addressed the meeting at the time and place of the above testimony. But my testimony concerning the statements I attributed to him to the effect that it was necessary to get them into the trade unions in the midwest in basic industries, and in the event of any war with the Soviet Union we would then have people on our side, is entirely false.

D. I testified that about April 15, 1949, I had a conversation with defendant George Blake Charney at his office at 35 East 12th Street, New York City, concerning my trip to Puerto Rico (Tr. 6636). I testified that in the course of this conversation he said that:

"• • • that I should familiarize myself with the Party, the Communist Party line on Puerto Rico. He pointed out—Mr. Blake said that the struggle for the independence of Puerto Rico was tied up directly with the struggle for socialism. He said the Puerto Rico was being used as a military base by the United States, and an independent Puerto Rico would help to destroy those bases and cripple the Caribbean defense. He pointed out that the only time Puerto Rico would get its independence was when we had conducted an effective struggle for socialism and had overthrown the bourgeoisie there. He said he had been to Puerto Rico before and that if Puerto Rico were independent the struggle for socialism there would be accomplished a lot easier." (Tr. 6637-38)

My testimony relating to conversations with defendant Charney is true only so far as I did have conversations with him relating to Puerto Rico and my trip to Puerto Rico. But my testimony that he said that "Puerto Rico was being used as a military base by the United States and an independent Puerto Rico would help to destroy those bases and cripple the Caribbean defense;" and that "He pointed out that the only time Puerto Rico would get its independence was when we had conducted an effective struggle for socialism and had overthrown the bourgeoisie there" is entirely false.

At no time during the many conversations and meetings I had with George Blake Charney and other meetings at which he was present, did he state that he advocated the overthrow of the United States Government by force, violence or any other means.

E. On July 21, 1952, I testified concerning a course which I attended in the Fall of 1948 in the Institute of Marxist Studies at the Jefferson School in the City of New York (Tr. 6608-9). I further testified that at one course taught by Beatrice Siskind (Tr. 6609) she said:

> "• • • that American exceptionalism was a theory started in the 1920s when the Communist Party was under the leadership of Lovestone. She stated that American exceptionalism said that the United States would not suffer economic crises in the event of world economic crisis, that we were exempt or we just couldn't have one here if labor worked with the bourgeoisie or the capitalists or the management, as the case may be. She pointed out and said that American exceptionalism was also carried forth under Earl Browder in 1945 and said that was the reason for his expulsion, and that you could not, she said, collaborate with the bourgeoisie or the capitalists, that labor could

not. The only way to avoid economic crises is with the establishment of socialism, and she stated that socialism could not be obtained under a peaceful means, it could not be obtained by collaboration, that the capitalists or bourgeoisie would not give up without a struggle, and therefore the working class, under the leadership of the Communist Party, would have to take over by power and overthrow the bourgeoisie." (Tr. 6610)

The foregoing testimony concerning what Beatrice Siskind said is entirely false. I had no recollection at the time I testified nor do I now have any recollection as to what if anything was taught to me concerning the subject discussed in the foregoing testimony. The testimony was entirely fabricated to create the false impression with the Court and the members of the jury that the Communist Party taught and advocated the overthrow of the United States Government by force and violence. Prior to the time when I took the witness stand I could not have discussed or testified to the answer which was given on the stand. I had informed United States Attorney Roy Cohn that I was unable to recall what, if anything, Beatrice Siskind had said in the course. During several sessions I had with Cohn, he helped me formulate the answer which I memorized and gave in my testimony. This testimony was not based on what was actually said by Beatrice Siskind, but was created for the purposes of the trial.

F. I testified that in December, 1948, I attended a meeting of the Communist Party in Philadelphia at which Henry Winston, Organizational Secretary of the Communist Party, spoke (Tr. 6622-24). I further testified that I returned from Philadelphia together with Henry Winston and that on this return trip Winston said:

"* * * that his article in the fourteenth convention issue of Political Affairs, which was September of 1948,

should be read and studied more fully by the members of the Communist Party. He said that it was important for the young members of the Communist Party in New York, members of the Yough (sic) clubs, to get out of New York and to get out into the midwest into basic industries, out in Ohio, Illinois, Indiana, Western Pennsylvania, and up-state New York near Buffalo. He said that it was important to go there so that the young Communists could form a nucleus of workers on the side of the Communist Party, to recruit and get young people into the Communist Party, so that in the event of any imperialistic war, as he put it, we could help the side of the Soviet Union, as he stated it, and slow down production, and in some places call strikes, and in general see that the war production, in the event of a war, would not carry forward to its fullest capacity." (Tr. 6625-6)

My testimony relating to my conversation with Henry Winston in December, 1948, was true only so far as I did have a conversation with Henry Winston, but my testimony that Henry Winston said "* * * so that in the event of any imperialistic war, as he put it, we could help the side of the Soviet Union, as he stated it, and slow down production, and in some places call strikes, and in general see that the war production, in the event of a war, would not carry forward to its fullest capacity" (Tr. 6626) was false.

G. The foregoing does not exhaust the matters concerning which I testified falsely at the trial of these defendants. Nor do the incidents related in paragraphs 4B and 4C exhaust the matters concerning which I testified falsely with the knowledge of the United States Attorneys. For, on other occasions in connection with other portions of my testimony, the United States Attorneys participated in formulating statements which I attributed to the defendants and other persons named in my testimony which was

not based on what was actually said, but which was created for the purposes of the trial.

The reason I have not described in this affidavit other testimony which I gave which was false and other testimony which the United States Attorneys knew to be false is that there has been insufficient time since I first spoke to any defense counsel concerning this motion and the making of this affidavit to read the entire record of my testimony and to locate all of the matters concerning which I testified to falsely and/or which was known to be false by the United States Attorneys.

5. I make and swear to this affidavit voluntarily and of my own free will, without having been threatened, coerced, influenced, or intimidated in any way; without having been given any payment, reward, or any thing of value, or any promise thereof; and only for the purposes of now telling the truth, the whole truth, and nothing but the truth, and as I have said, to do what I can to remedy the harm I have done to these defendants and to the administration of justice.

6. I am willing to appear and testify to the truth of the above matters at any time.

/s/ Harvey M. Matusow
Harvey M. Matusow

Sworn to before me this
31st day of January, 1955.
/s/ Robert Z. Lewis
Robert Z. Lewis
Notary Public, State of New York
No. 31-7537400
Qualified in New York County
Commission Expires March 30, 1956